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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 9, ORIGINAL

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF LOUISIANA, ET AL.

ON CROSS-MOTIONS FOR THE ENTRY OF A SUPPLEMENTAL DECREE AS TO THE STATE OF LOUISIANA (NO. 2)

BRIEF FOR THE UNITED STATES

JURISDICTION

This is an original action brought by the United States against the State of Louisiana. Jurisdiction is based upon Article III, section 2, of the Constitution and 28 U.S.C. 1251(b)(2).

At an earlier stage of this proceeding the Court issued a decree on the merits, reserving jurisdiction—

> to entertain such further proceedings, enter such orders and issue such writs as may * * * be deemed necessary or advisable to give proper force and effect to this decree. [364 U.S. 502, 504.]

The motions now pending are cross-motions by the United States and Louisiana seeking supplemental re-

lief necessary to clarify and particularize the prior decree.

STATUTES, REGULATIONS, AND CONVENTION INVOLVED

Relevant parts of the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1301–1315, the Act of February 19, 1895, 28 Stat. 672, as enacted and as amended, 33 U.S.C. 151, the Coast Guard Regulations, 33 C.F.R. §§ 82.1, 82.2, 82.95, and 82.103, and the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. (Pt. 2) 1606, are set out in Appendix A, *infra*, p. 145.

QUESTIONS PRESENTED

1. Whether the "coast line" for the purposes of the Submerged Lands Act is the baseline for measuring the territorial sea established by the Convention on the Territorial Sea and the Contiguous Zone or a line established by the Commandant of the Coast Guard for the purpose of defining areas in which shipping should follow the Inland Rules of Navigation.

2. Where is the exact boundary line between the lands under the Gulf of Mexico belonging to the United States and the lands belonging to Louisiana.

The principal issues of law embraced within the foregoing question are:

(a) Whether the rules provided by the Convention are to be rejected because they result in an ambulatory boundary.

(b) Whether the coastal maps prepared under joint Federal-State supervision for the purposes of this case should be rejected.

(c) Whether dredged channels extending into the Gulf, marked only by buoys, are "permanent harbour works which form an integral part of the harbour system," within Article 8 of the Convention.

(d) What is a "well-marked indentation" containing "landlocked waters," within Article 7.

(e) Whether an island or a low-tide elevation always surrounded by water may be used as the headland of a bay, within Article 7.

(f) If so, whether the lengths of the lines from islands or low-tide elevations to the mainland which are necessary to close a bay, may be disregarded in applying the 24-mile rule of Article 7.

(g) Whether low-tide elevations within three miles of inland waters but not within three miles "from the mainland or an island" may be used as base points for projecting the three-mile limit, under Article 11.

(h) Whether the waters of separate landlocked bays that satisfy the semicircle test may be added to an outer body of water which, by itself, fails to meet the test in order to qualify the outer body as a bay under Article 7.

(i) Whether a bay whose mouth is almost entirely closed by a chain of islands should be delimited by direct lines between the outermost points of the most seaward islands, rather than by lines across the entrances between successive islands.

(j) Whether beach erosion jetties extending from a shore where there is no harbour are "permanent harbour works which form an integral part of the harbour system," within Article 8.

(k) Whether a spoil bank unlawfully placed in the navigable waters of the United States is part of the coast.

(l) Whether the Mississippi Delta is to be excepted from the international Convention.

(m) Whether East Bay is to be treated as a bay despite failure to satisfy the semicircle test prescribed by Article 7.

3. What incidental provisions should be included in a decree adjudicating title to the disputed areas.

Specifically, the principal issues embraced within the foregoing question are:

(a) Whether the decree should leave Louisiana free from any obligation to account, either to the United States or to the payor, for duplicate rents and royalties received from areas awarded to the United States.

(b) Whether the decree should adjudicate Louisiana's title to the beds of all inland waters within the State, including rivers and lakes, even those not in controversy in this action.

(c) Whether the decree should require each party to establish additional procedures for recognizing leases of lands awarded to it, issued by the other party.

(d) Whether the decree should omit definitions of legal terms applied in demarcating the present location of the ambulatory boundary.

(e) Whether an injunction should issue against the United States where Congress has not consented and no threat of continuing trespass has been shown.

STATEMENT

This case is before the Court upon cross-motions by the United States and Louisiana for a supplemental decree defining more specifically the boundary line between the lands underlying the Gulf of Mexico which belong to the United States and those which belong to Louisiana.

The motions are a major step towards the conclusion of protracted controversy and litigation. In *United States* v. *Louisiana,* 339 U.S. 699 and 340 U.S. 899, the Court held that Louisiana owned no submerged lands seaward of the low-water line and outer limit of inland waters. The Submerged Lands Act of May 22, 1953, 67 Stat. 29, 43 U.S.C. 1301–1315, gave Louisiana and other coastal States the submerged lands within their boundaries. The Act confirmed and approved any past or future claim of a State to a boundary extending "to a line three geographical miles distant from its coast line,"[1] with the further provision that the boundary might extend up to three leagues in the Gulf of Mexico if it was so provided by the State's constitution or laws when such State became a member of the Union.[2] Louisiana claimed that her historic boundaries in the Gulf of Mexico extended three leagues (nine geographical miles) from the coast. The United States then filed its complaint in the present case, seeking to establish its title to submerged lands beyond the three-

[1] Section 4, 43 U.S.C. 1312.

[2] Section 2(b), 43 U.S.C. 1301(b).

mile belt, to enjoin further trespasses, and to secure an accounting.

In *United States* v. *Louisiana,* 363 U.S. 1, the Court held that, under the Submerged Lands Act, Louisiana is entitled only to lands within three geographical miles from the coast line, which the decree defined, in accordance with Section 2(c) of the Submerged Lands Act, as—

> the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters. [364 U.S. 502, 503.]

Since then, the controversy has been over the application of this definition to the Louisiana coast, particularly over the meaning and exact geographic location of "the line marking the seaward limit of inland waters."

The decision in *United States* v. *California,* 381 U.S. 139, opened the way to removing certain portions of the once-disputed areas from the zone of controversy. On motion of the United States not opposed by Louisiana a supplemental decree was entered in the present case in 1965 awarding to Louisiana four specific offshore areas (largely due under the principles established in the *California* case) and confirming the title of the United States to areas more than three miles from the most extended coast line claimed or recognized by either party. The decree also directed an accounting and the distribution of

funds collected from the specified areas pendente lite. *United States* v. *Louisiana,* 382 U.S. 288.[3]

The cross-motions now before the Court look to the resolution of all the issues remaining in controversy concerning identification of the coast and boundary lines on definitive charts.[3a] In addition, they raise a few questions concerning an accounting and the form of the decree.

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[3] On December 4, 1967, the Court decided in this case certain questions regarding the State of Texas, *United States* v. *Louisiana,* 389 U.S. 155. The issues were confined to problems regarding historic boundaries in excess of three miles from the coast line, and have no direct relevancy to Louisiana, whose historic claim was rejected by the Court. The remaining point of difference between the United States and the State of Texas with respect to the implementation of that decision—now pending before the Court on alternative decrees submitted by the parties—is likewise irrelevant to the present controversy involving Louisiana.

[3a] The problem of defining the lateral limits of Louisiana's offshore submerged lands primarily concerns Louisiana and its neighbor States, and would be left open by the decree proposed by the United States. U.S. Mot. 9, 66. Louisiana expresses agreement with that approach, and says that its "alternative decree expressly limits the location of the Louisiana coast line to the area within her lateral boundaries," La. Resp. and Opp. 37–38. In fact, however, both Louisiana's primary and alternative coast line descriptions appear to have specific termini: in the east, points on Ship Island in Mississippi, and in the west, a navigational buoy off Sabine Pass or a point on the western side of the dredged channel outside the Pass. Louisiana's alternative decree does nevertheless limit the State's submerged lands, though not its described coastline, to the area "bounded on the east and west by the eastern and western boundaries of the State of Louisiana." La. Resp. and Opp. 67.

SUMMARY OF ARGUMENT

I.

The boundary line between the lands of the United States and the lands of Louisiana under the Submerged Lands Act lies three miles from the "coastline." The coastline is defined as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." Sec. 2(c), 43 U.S.C. 1301(c). In *United States* v. *California*, 381 U.S. 139, 161–167, this Court held that these words are to be given their content in international law, and the controlling principles are to be found in the Convention on the Territorial Sea and Contiguous Zone. Accordingly, the coastline of Louisiana, for the purposes of the Submerged Lands Act, should be demarcated in accordance with the Convention.

There is no merit to Louisiana's contention that the "coastline" or "outer limit of inland waters" is a line drawn by the Commandant of the Coast Guard on December 1, 1953, under the Act of February 19, 1895, 28 Stat. 672, as amended, 33 U.S.C. 151, for the sole purpose of separating the areas in which shipping must follow the Inland Rules of Navigation from those in which it is governed by the International Rules. The Coast Guard line is utterly inconsistent with the Convention.

Even as an original matter, the Coast Guard line could not be accepted as determinative for the purposes of the Submerged Lands Act. Although the 1895 statute uses the words "inland waters," there is not the slightest reason to suppose that Congress intended to incor-

porate any Coast Guard lines into the Submerged Lands Act, for the Coast Guard lines are drawn solely for navigational purposes without regard to territorial boundaries or international law. Such slight indications of intent as can be found in the legislative history show that the congressional committees concluded that Coast Guard lines would not be helpful. Furthermore, incorporation of the Coast Guard line is utterly inconsistent with the recognized intent to have the Court determine the meaning of "inland waters" in accordance with its signification in determining the territorial boundaries of the United States in international law. *United States* v. *California*, 381 U.S. 139, 162.

No power to establish the territorial boundaries of the United States was conferred upon the Secretary of the Treasury (and by subsequent transfers, upon the Commandant of the Coast Guard) by the Act of February 19, 1895. Its only purpose was to provide mariners with clear guidance concerning the specific areas governed by each of two inconsistent sets of navigation rules. If there had been an intent to define "inland waters" for the purposes of territorial sovereignty and international relations, the power would have been given to the President and Secretary of State.

The Secretary of the Treasury and the Commandant have never adhered to the territorial boundary in international law. Many segments of the Coast Guard line do not conform to the territorial boundary. It has not been laid out in terms conforming to international law. Segments have been changed periodically in order to meet the convenience of shipping, without alteration of the territorial boundary or change in inter-

national law. The Secretary of State and the Coast Guard have explicitly stated on many occasions that the regulations issued under the 1895 statute are solely for navigational purposes and do not represent territorial boundaries. Such a statement is part of the very order on which Louisiana relies. Thus, the Coast Guard line neither fixes nor finds the "inland waters" of the United States for the purposes of the Submerged Lands Act.

II.

The decree submitted by the United States correctly applies to the Louisiana area the rules established by the Convention on the Territorial Sea and Contiguous Zone.

From Sabine Pass to Tigre Point the line should follow the line of mean low water, including the Sabine Pass jetty. Dredged channels, however, are not to be treated as "harbour works" under Article 8 of the Convention because the rationale and international discussions show that only raised structures such as jetties and breakwaters were intended. The purpose of Article 8 is to treat artificial modifications of the shore line like natural changes. Since a natural channel extending from a nation's coast does not extend its boundary, it cannot be extended by one that is dredged.

From Tigre Point to the vicinity of Shell Keys, and then east to South Point on Marsh Island, the line should follow the shore, with such minor variations as are needed for islands and appropriate low-tide elevations. The waters Louisiana would enclose south of the mainland and Marsh Island by a line from Tigre Point to the southern extremity of Shell Keys are not a "bay"

within Article 7 for three reasons: (1) they are not a "well-marked indentation" and fail to meet the semi-circle test; (2) complete closing lines, which Louisiana omits, would exceed 24 miles in length; and (3) an island or low-tide elevation may not be used as a headland of a bay.

Atchafalaya Bay and the connecting waters to the north and northwest are inland waters. The main closing line should run from South Point to Point au Fer. The line Louisiana seeks to draw farther out in the Gulf is impermissible, first, because it uses low-tide elevations as headlands, which the Convention does not permit and, second, because a complete closing, using Louisiana's suggestion as part of the closing, would be more than 24 miles in length.

The low-tide elevations outside the closing line are not part of the baseline for measuring the three-mile limit because Article 11 permits use of low-tide elevations only when situated within three miles "from the mainland or an island." A careful reading of the history of the Convention shows that the literal reading of "from the mainland or an island" is correct.

From Point au Fer to Raccoon Point the line follows the shore except for low-tide elevations within three miles of the mainland. Caillou Bay is not a true bay within Article 7 because the Isles Dernieres, on which Raccoon Point is located, are islands and offshore islands may not form a bay where, without them, there would be no well-marked indentation in the coast.

In the segments from Raccoon Point to Caminada Pass a number of technical issues arise. The key principle is that the lines closing the inland waters behind

the long chain of barrier islands extending from the peninsula near Pelican Lake to a mainland headland just west of Bay Marchand, should run between successive islands—instead of cutting across between a few outer points, as claimed by Louisiana—because the chain forms the natural barrier between the internal waters behind the islands and the open waters of the Gulf. Where islands form so tight a screen, the bay as a geographical entity cannot be said to extend outside.

From Caminada Pass to Southwest Pass, the coastline generally follows the curve of the mainland coast and barrier islands in the mouth of such inland waters as Caminada, Barataria, and Bastian Bays around to the Empire Canal and the northern headland of West Bay; from there it runs straight across to a promontory at Lighthouse Bayou. The broad area of the Gulf to which Louisiana has given the name "Ascension Bay"—the name cannot be found in any authority on geography or on any existing chart—is not a true bay within the meaning of Article 7. The waters are neither a "well-marked indentation" nor "landlocked;" they also fail to meet the semicircle test. Louisiana's effort to overcome the last objection by aggregating separate waters such as Caminada, Barataria and Bastian Bays is impermissible, because they are distinct geographical entities. Louisiana's view would allow every nation to claim open waters outside the natural headlands of a landlocked bay wherever the true entrance was in a slight curvature of the coast.

In drawing this segment of the coastline, the beach erosion jetties at Grand Isle do not qualify for inclu-

sion as "harbour works" under Article 8. Since there is no harbour at Grand Isle, they cannot be *"harbour* works" or an "integral part of the *harbour* system." The closing lines of West Bay should be drawn as suggested by the United States. Louisiana's line defeats the claim that West Bay is inland waters by eliminating it under the semicircle test.

The Mississippi Delta area from Southwest Pass around to Main Pass is governed by the Convention, just as other sections of the coast. The Convention was written in strictly geographic terms drawing upon data appearing upon coastal charts for the very purpose of providing a fixed set of international rules applicable to all coasts, regardless of claims to geologic or economic uniqueness. Louisiana has cited no evidence to support the argument that the waters which are high seas under other tests have been historically treated as inland waters. More particular issues in this area are too closely related to the facts for summarization.

From Main Pass to Ship Island the line depends not upon strictly geographical criteria but upon earlier concessions by the United States. Chandeleur and Breton Sounds are not inland waters under the Convention. The United States, before the Convention was signed or this Court held that its definitions were applicable under the Submerged Lands Act, had treated the sounds as inland waters in dealings with Louisiana and potential lessees. We do not seek to be relieved of the concession because it seems undesirable to upset arrangements made on the strength thereof, but the limits of the concession mark the full

extent of the areas to be awarded Louisiana, because the Convention supplies no basis for her additional claim.

III.

Louisiana should be required to account for all receipts from lands awarded to the United States, including duplicate payments made by pipeline companies and other lessees seeking to protect themselves against claims by either party.

The decree should be broadened beyond the initial suggestion of the United States in order to adjudicate the rights of Louisiana in areas actually disputed in this case, but should not declare Louisiana's right to rivers, lakes and other inland waters outside the litigated issues.

No injunction should run against the United States.

A period of readjustment should be provided for the holders of split leases. The validity of all leases issued pursuant to the interim agreement of October 12, 1956, should be recognized, but there is no need for the Court to prescribe the procedures for validation.

Since the boundary is ambulatory, the decree should contain a formal adjudication of the principles by which the line demarcated by the decree is determined.

ARGUMENT

Introductory.—The issues raised by these motions fall into three parts.

The first and basic question is, where does one find the full meaning of "coast line" as used in the Sub-

merged Lands Act and the Decree of December 12, 1960, both of which define it as—

> the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters.

The parties agree upon the meaning of "the line of ordinary low water." There is no dispute about the method of measuring three geographical miles from the coast line in order to lay out the boundary once the coast line is fixed. Thus, the heart of the controversy is over the definition of the term "inland waters" as applied to the Louisiana coast.

We submit that the definition is to be filled out by giving it an international content and applying the rules provided by the Convention on the Territorial Sea and the Contiguous Zone, approved by the Senate in 1960 and ratified by the President in 1961. That was the decision in *United States* v. *California,* 381 U.S. 139.

Louisiana argues that the coast line is a line much farther out in the Gulf of Mexico promulgated in 1953 by the Acting Commandant of the Coast Guard under the Act of February 19, 1895, as amended, for the purpose of describing the areas in which shipping is to follow the Inland Rules of Navigation, 33 U.S.C. 152–232, rather than the International Rules applicable outside that line, 33 U.S.C. 1051–1094.

These alternatives are mutually exclusive. Furthermore, the choice lies between them. For although Louisiana expresses specific reservations and criticisms about the use of the Convention if the Coast

Guard regulation is rejected, she proposes no other general source of rules.

The second part of the case arises if the United States prevails upon the first. It is made up of a sizeable number of relatively specific issues concerning the manner in which the Convention applies to the Louisiana coast.

The third part consists of questions of law that arise in accounting for the proceeds of areas originally in dispute and other incidental provisions of the decree.

I

"INLAND WATERS" ARE TO BE DETERMINED IN ACCORDANCE WITH THE CONVENTION ON THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE

A. UNITED STATES V. CALIFORNIA, 381 U.S. 139, SHOULD CONTROL THE PRESENT CASE

In *United States* v. *California,* 381 U.S. 139, the Court thoroughly canvassed the meaning of the terms "coast line" and "inland waters" as used in the Submerged Lands Act and made three clear-cut rulings applicable to all the coastal States:

(i) Congress left the definition of "inland waters" to the courts to be worked out along the line of prior judicial determinations. 381 U.S. at 150–160.

(ii) As indicated in such earlier cases as *United States* v. *California,* 332 U.S. 19, the terms were to have an international content because the definition of "inland waters" "will (1) determine for the present the location of the marginal belt which we claim

against other nations, and (2) define the areas within which ships of foreign nations have no right of innocent passage." 381 U.S. at 162, esp. n. 25.

(iii) The court will therefore look to the Convention on the Territorial Sea and the Contiguous Zone for the definition of "inland waters." On this point the Court said (381 U.S. at 165):

> It is our opinion that we best fill our responsibility of giving content to the words which Congress employed by adopting the best and most workable definitions available. The Convention on the Territorial Sea and the Contiguous Zone, approved by the Senate and ratified by the President, provides such definitions. We adopt them for purposes of the Submerged Lands Act. This establishes a single coastline for both the administration of the Submerged Lands Act and the conduct of our future international relations (barring an unexpected change in the rules established by the Convention).

The *California* decision was a general and definitive interpretation of the Submerged Lands Act. There is no material difference between the situation of Louisiana and that of California and all the other coastal States. Coast Guard regulations define areas in which the Inland Rules of Navigation are to be followed on the Atlantic and Pacific coasts as well as the Gulf of Mexico. The Coast Guard line in some of the areas in controversy in *United States* v. *California* does not coincide with the line of inland waters under the Convention, and the difference was called to the Court's attention on oral argument. That Louisiana

enacted legislation, Act No. 33 of 1954, claiming the Coast Guard line to be the limit of her inland waters, while California did not, is irrelevant because the meaning of the words used in the Submerged Lands Act does not depend upon the action of the States.

Since the line fixed in the Coast Guard regulation is utterly inconsistent with the definitions and rules in the Convention, it has no bearing upon boundaries under the Submerged Lands Act. But even apart from that inconsistency, the Coast Guard regulations are irrelevant.

B. THE COAST GUARD REGULATION DEFINING THE "INLAND WATERS" IN WHICH SHIPPING IS TO FOLLOW THE INLAND RULES OF NAVIGATION IS IRRELEVANT UNDER THE SUBMERGED LANDS ACT

The Act of April 29, 1864, 13 Stat. 58, codified as R.S. § 4233, promulgated "rules for preventing collisions on the water" applicable to "vessels of the Navy and of the mercantile marine of the United States." The rules were based upon an International Code. Since R.S. § 4233 applied to all vessels of domestic registry on any waters, there was no need to distinguish the high seas from inland waters, or inland waters along the coasts from rivers, lakes and other navigable waters of the United States.

In 1885 Congress adopted "Revised International Regulations" for "all public and private vessels of the United States upon the high seas and in all coast waters of the United States" except where otherwise provided for. Act of March 3, 1885, 23 Stat. 438. Section 2 repealed R.S. § 4233 except as to navigation

"within the harbors, lakes, and inland waters of the United States."

The Act of August 19, 1890, 26 Stat. 320, adopted rules, as proposed by a new international conference in 1889, for "all public and private vessels of the United States upon the high seas and in all waters connected therewith, navigable by seagoing vessels." Minor amendments were added in 1894 to conform to objections by Great Britain and Spain. 28 Stat. 82. Article 30 of these rules as proposed by the international conference and adopted by the United States provided that "Nothing in these rules shall interfere with the operation of a special rule, duly made by local authority, relative to the navigation of any harbor, river, or inland waters." 26 Stat. 328.

It will be observed that the Acts of 1885 and 1890 did not apply to all waters and thus left the Rules in R.S. § 4233 in force in some areas. Since the two sets of rules contained inconsistencies, confusion seems to have arisen as to the areas in which one or the other should be followed. One may also surmise that after 20 or 25 years local shipping objected to shifting to the new International Rules. In any event, in section 1 of the Act of February 19, 1895, 28 Stat. 672, Congress, making specific reference to Article 30 of the International Rules, enacted that the Rules set forth in R.S. § 4233 should be followed "on the harbors, rivers and inland waters of the United States." Section 2 then directed the Secretary of the Treasury from time to time to designate the lines separating the high seas from rivers, harbors, and inland waters.

By various transfers the authority came to be vested in the Commandant of the Coast Guard.[4]

The Commandant (or other proper official) has designated and changed such lines, from time to time, in areas where shipping might otherwise be confused about whether to follow the International or Inland Rules. The regulations in force on May 22, 1953, when the Submerged Lands Act became effective, covered only part of the waters off Louisiana. 12 Fed. Reg. 8458, 8460. On December 1, 1953, however, the Acting Commandant revised the regulation so as to draw lines applicable to all waters off the Louisiana coast. 18 Fed. Reg. 7893–7894. The order specifically stated that the lines were established "solely for purposes connected with navigation and shipping," and "are not for the purpose of defining Federal or State

[4] The authority which section 2 conferred on the Secretary of the Treasury was successively transferred to the Secretary of Commerce and Labor (Act of February 14, 1903, Sec. 10, 32 Stat. 829), later redesignated "Secretary of Commerce" (Act of March 4, 1913, Sec. 1, 37 Stat. 736), transferred to the Commandant of the Coast Guard (Reorganization Plan No. 3 of 1946, Secs. 101–104, 60 Stat. 1097–1098), transferred to the Secretary of the Treasury, or to the Secretary of the Navy when the Coast Guard is operating in that Department (Reorganization Plan No. 26 of 1950, 64 Stat. 1280) and delegated by the Secretary of the Treasury to the Commandant of the Coast Guard (Treasury Department Order of July 31, 1950, 15 Fed. Reg. 6521). Subsequent to the order of December 1, 1953, which Louisiana invokes, section 6(b)(1) of the Department of Transportation Act, October 15, 1966, 80 Stat. 931, 938, transferred this authority to the Secretary of Transportation, effective April 1, 1967. See Executive Order No. 11340, March 30, 1967, 32 Fed. Reg. 5453. He again delegated it to the Commandant of the Coast Guard, effective April 1, 1967. 49 C.F.R. § 1.4(a)(2), 32 Fed. Reg. 5606.

boundaries, nor do they define or describe Federal or State jurisdiction over navigable waters."

Nevertheless, by Act. No. 33 of 1954, Louisiana declared that she "accepted and approved" the new Coast Guard line as her coast line; and it is the Commandant's demarcation of the inland waters for the sole purpose of prescribing the applicable rules of navigation that Louisiana contends defines her inland waters for the purposes of the Submerged Lands Act.

We submit that the Coast Guard regulation is irrelevant to any issue in this litigation. Congress did not adopt the Coast Guard lines as the line of inland waters for the purposes of the Submerged Lands Act, nor did it delegate to the Commandant the power to draw the line of demarcation for the purposes of that Act. Although the power of the Secretary of the Treasury was once or twice mentioned in connection with one of this Court's decisions by witnesses in much earlier hearings,[5] neither the committee reports nor the floor debates contain the slightest indication that anyone supposed that the Secretary or the Commandant had either made definitive determinations or was being given the authority to make them.[6] Indeed,

[5] *E.g.*, Hearings, Subcommittee No. 1, H. Judiciary Committee, H.R. 5991 and H.R. 5992, 81st Cong., 1st sess., 74; Hearings, S. Committee on Interior and Insular Affairs, S. 155, etc., 81st Cong., 1st sess., 179–180, 194–195.

[6] Since Louisiana contends that the Coast Guard line drawn in December 1953, after passage of the Submerged Lands Act controls, she is necessarily arguing that Congress intended a minor federal official to make a binding determination of the coast lines and inland waters of the several States, *sometime in the future*, for the purposes of the Submerged Lands Act.

the only indication we have found looks in the opposite direction. During the hearings on the Submerged Lands Act, the following exchange occurred between a spokesman for Louisiana and a member of the Senate Committee (Hearings, S. Committee on Interior and Insular Affairs, S.J. Res. 13, 83d Cong., 1st sess., 276):

> Mr. MADDEN. * * * I remember the old statute that authorized, I believe it was first the Secretary of Commerce, or the Treasury, to fix a line to show the demarcation between inland waters and the high seas. I think the Coast Guard has attempted to draw a partial line over on the east side of Louisiana.
>
> Senator ANDERSON. We went through all that in the hearing a couple of years ago, and found that was of no value to us whatsoever. * * *

Louisiana's argument is squarely at odds with the manifest intention to provide for a judicial determination of inland waters according to the standards applicable in international relations. The evidence of this intention is fully collected in the opinion of the Court in *United States* v. *California,* 381 U.S. 139, 150–161.

The only other way of connecting the Coast Guard regulation to the Submerged Lands Act is to argue that, although the term "inland waters" means the inland waters of the United States for territorial purposes in international relations, still the Coast Guard regulation establishes, or is controlling evidence of, our boundaries for international purposes. The answer, which we elaborate below, is twofold: first, the Act of February 19, 1895, as amended, does not dele-

gate to the Commandant the power to define the boundaries of the United States for international purposes; second, neither the Commandant nor any of his predecessors has ever exercised such power.

1. The Act of February 19, 1895, as amended, does not delegate power to define the inland waters under sovereignty of the United States

In our view, Section 2 of the Act of February 19, 1895, delegates power to draw a line of demarcation between the high seas and rivers, harbors, and inland waters for the sole purpose of prescribing where shipping should follow the International Rules incorporated into the Act of August 19, 1890 and where vessels should adhere to the Inland Rules contained in R.S. § 4233. The combination of history, text, inherent probability, and long-continued administrative interpretation convincingly demonstrates that this was intended to be the sole function of the executive demarcation.

(a) The history of the Act shows that its only purpose was to meet a navigational problem, not to delimit national sovereignty. It was requested by the Secretary of the Treasury, who wrote, "The general purpose of the bill is to establish regulations for preventing collisions in harbors, rivers, lakes, and inland waters of the United States, in accord, as far as possible, with the international regulations of the act of August 19, 1890, which will go into effect March 1, 1895, and also in accord with certain regulations now in force upon those waters." S. Exec. Doc. No. 35, 53d Cong., 3d sess., 2 (Cong. Doc. Ser. No. 3275). Section 2 was an afterthought, added to the House

bill by the Senate "at the request of the maritime interests of New York and Philadelphia." Explanation by House conferees, 27 Cong. Rec. 2059. The only other discussion of it was a statement that "It authorizes the Secretary of the Treasury to define harbor limits, within which the local rules shall apply and outside of which the international rules shall apply." *Ibid. Cf. id.*, 1421, 1883, 2064.

(b) The title of the Act confirms its limited function:

> An Act To adopt special rules for the navigation of harbors, rivers and inland waters of the United States, except the Great Lakes and their connecting and tributary waters as far east as Montreal, supplementary to the Act of August nineteenth, eighteen hundred and ninety, entitled "An Act to adopt regulations for preventing collisions at sea."

(c) Section 2 contains at least two bits of internal evidence that Congress intended the Secretary of the Treasury not to be concerned with the outer line of inland waters as an international boundary. First, it directs him to define the line "by suitable bearings or ranges with light houses, light vessels, buoys or coast objects." Most of these points of reference—light houses, light vessels and buoys—would be utterly inappropriate for demarcating an international boundary even under the then-accepted criteria of international law. Conversely, they would be more easily identifiable by the shipping required to determine which set of rules to follow. Second, section 2 directs the Secretary to make his designations "from time to time." The implication is that the line

may be changed periodically according to what experience and the changing needs of shipping in particular areas show to be the most convenient rule. But Congress can hardly have supposed that it was giving even the Secretary of the Treasury power to change the extent of our national sovereignty "from time to time."

(d) Indeed, it is inherently improbable that Congress would give the Secretary of the Treasury any power to define major portions of the boundaries of the United States. The United States has always recognized that the limits of sovereignty in coastal waters are controlled by international law. Even if one makes the improbable assumption that Congress would delegate to any one official the function of defining the territorial limits of the United States, the only natural recipient of such authority is the President or the Secretary of State. Certainly, if later Congresses had supposed that the function performed under the Act of February 19, 1895, had the international significance that Louisiana's argument assigns to it, they would hardly have permitted the power to be transferred from department to department by legislation and executive order, and ultimately vested in the Commandant of the Coast Guard, a subordinate official.

2. The regulations issued under the Act of February 19, 1895, are exclusively concerned with rules of navigation

If there were ever doubt about the intent of the Act of February 19, 1895, it has been put to rest by unbroken administrative practice. The Secretary of the Treasury and other officials in whom the powers

delegated by the Act were vested have not defined the territorial waters of the United States. They did not apply international law or the criteria followed by the United States in its international relations. They did not purport to be defining inland waters for any territorial purpose, and their lines have never had any function beyond identifying the rules of navigation to be followed in particular areas. The limited function of the lines, always implicit in practice, has in recent years been made increasingly explicit, so that Louisiana's argument that the regulation of December 1, 1953, defined the inland waters of the United States in a territorial sense for the purpose of international law flies in the face of the express words of the regulation (18 Fed. Reg. 7893):

> The establishment of descriptive lines of demarcation is solely for purposes connected with navigation and shipping. * * * These lines are not for the purpose of defining Federal or State boundaries, nor do they define or describe Federal or State jurisdiction over navigable waters.

Coast Guard Practice. From the beginning the lines were defined in terms highly appropriate for navigation but utterly unacceptable for the purposes of international law. The divergence makes it plain that the Secretary of the Treasury and the other officials to whom the power was transferred were neither establishing *de novo* nor attempting to "find," in accordance with international law, the jurisdictional waters of the United States.

Thus, the early lines often did not attempt to delimit bays or any other recognized category of inland

waters, but simply skirted long sections of the coast. Often they greatly exceeded the length of 6 miles originally recognized by the United States as the maximum permissible width for bays, or the length of 10 miles recognized at least since 1930, or even the length of 24 miles recognized under the Convention on the Territorial Sea and the Contiguous Zone ratified by the President on March 24, 1961. Many were drawn to buoys or lightships, which are not permissible base points even for the liberal "straight baselines" provided for by Article 4 of the Convention, 15 U.S.T. (Pt. 2) 1608. All these faults are illustrated by the line specified for the coast of Maine, New Hampshire, and part of Massachusetts in 1897.[7] Treasury Dept. Circular No. 23, Feb. 9, 1897; Treasury Dept., Synopsis of Decisions (1897) 139. An even more extreme example of impermissible base points is found in the line described in 1900 for Charleston

[7] The description reads:

A line drawn from Petit Manan Light House SW. ⅜ S., 26½ miles, to Mount Desert Light House; thence W. ⅜ S., 33½ miles, to Matinicus Rock Light Houses; thence WNW. ⅞ W., 20 miles, to Monhegan Island Light House; thence W., 21 miles, to Seguin Island Whistling Buoy; thence W. ¾ S., 19 miles, to Old Anthony Whistling Buoy, off Cape Elizabeth; thence SW., 28 miles, to Boon Island Light House; thence SW. ⅛ W., 12 miles, to Anderson Ledge Spindle, off Isles of Shoals Light House; thence S. by W. ¼ W., 19½ miles, to Cape Ann Light Houses, Massachusetts.

The line is illustrated in part in Figure 1, on the opposite page.

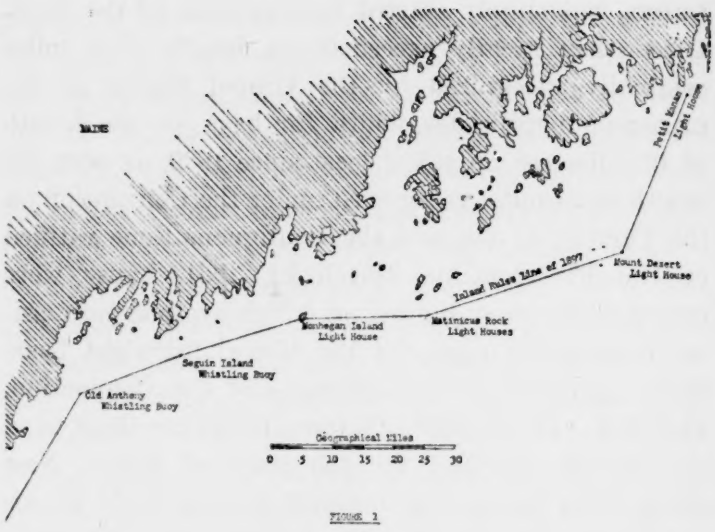

FIGURE 1

Harbor. Treasury Dept. Circular No. 107, July 12, 1900; 3 Treas. Dec. (1900) 592, 594.[8]

Similar gross divergencies between the Coast Guard lines and the outer line of the inland waters of the United States determined by principles of interna-

[8] The description read:

> From Charleston Light Vessel N. 5/8 E. to Rattlesnake Shoal West Buoy; thence W. 1/2 N. to the west end of the North Jetty; and from Charleston Light Vessel about SW. 1/8 W. through Charleston Whistling Buoy (proposed position) until Charleston Light House bears NNW. 1/2 W.; thence W. to Folly Island.

A line from a lightship through the *proposed* site of a buoy to a place where a certain cross-bearing can be observed does not created "landlocked" waters in any sense ever recognized in international law. Moreover, it had been specifically decided as long ago as 1804 that Rattlesnake Shoal, being permanently submerged, was not part of the baseline for measuring the three-mile territorial sea. *Soult* v. *L'Africaine*, 22 Fed. Cas. No. 13,179 (D. S.C.).

tional law are to be found elsewhere along the coasts and in later definitions, but none is more dramatic than the line claimed by Louisiana. After following the Chandeleur Islands the line runs to the "southwesternmost extremity of Errol Shoal." The shoal is a part of the sea bed, below the level of mean low water and not even marked by a buoy.[9] From that point on, all of the termini of segments of the line are at offshore buoys, with the single exception of Ship Shoal Lighthouse, which stands in water about 10 feet deep at mean low tide. U.S.C. & G.S. Chart No. 1275. The lengths of the successive segments of the Coast Guard Line are 26.01 miles, 14.02 miles, 18.03 miles, 86.28 miles, 124.93 miles, and 25.61 miles. They cannot be justified either as "straight baselines" under Article 4 of the Convention nor as closing lines of a bay or bays under Article 7, and no other justification is available for them under the Convention or under prior international law.

Neither in combination nor separately do these lines delimit a bay or bays. The waters encompassed by the combined line, being convex rather than concave, are not a bay in form; and the combined length of the closing lines, 294.88 miles, exceeds any standard ever recognized for a bay. Even considered separately, all of the segments exceed the length of 10 miles recognized by the United States as permissible for bay entrances prior to the Convention, and four of

[9] The regulation identifies the point as being 29°35.8′ N. latitude, 89°00.8′ W. longitude. This will help a navigator to locate it, but does nothing to qualify it as a headland enclosing landlocked waters.

them even exceed the 24-mile limit of the Convention. Moreover, the lines do not delimit separate bays; and offshore shoals, buoys, or lighthouses have never been recognized as acceptable headlands of bays. A lighthouse on a permanently submerged reef is not part of the coast of the United States. See *United States* v. *Henning*, 7 F. 2d 488, 489 (S.D. Ala.).

The Coast Guard line is equally unacceptable as a "straight baseline" under Article 4 of the Convention. That Article permits baselines to be drawn to low-tide elevations only where there are lighthouses,[10] and makes no provision for use of permanently submerged shoals, with or without structures, or mere buoys. Moreover, the lines could not be regarded as straight baselines, even if they otherwise qualified, because they have not been promulgated as straight baselines in accordance with Article 4. *United States v. California*, 381 U.S. 139, 168.

The Coast Guard's constant alteration of lines separating the rivers, harbors and inland waters, where the Inland Rules apply, from the high seas, where the International Rules control, also shows that their demarcation does not establish the territorial boundaries of the United States.[11] In other locations the Com-

[10] For a general review of the development of the law regarding use of islands and low-tide elevations for the baseline of the territorial sea, see 4 Whiteman, *Digest of International Law* (1965) 274–307.

[11] Through the years, the changes that have been made in the Coast Guard's navigational lines have been vastly greater than the changes that have occurred in the shoreline, even in Louisiana. For example, the line asserted by Louisiana represented a seaward movement in 1953 of over 20 miles opposite Barataria Bay; the 1935 line referred to in fn. 12, *infra*, represented

mandant has from time to time promulgated new lines not conforming to the boundaries established by international law, as in the Gulf of Mexico.[12] The notion that the Commandant of the Coast Guard would try to make periodic changes in the political limits of the United States is too bizarre for further comment.

Similarly, the repeated revisions preclude reliance upon the Coast Guard lines as evidence of the national boundaries established by other authority or international law. The revisions have not followed political events that might have been thought to affect the boundary or change international law. If the repeated revisions of these lines through the years are to be taken as corrections of prior errors, that in itself is enough to demonstrate that the lines were subject to such gross inaccuracies as to have little if any evidentiary value to show the true jurisdictional limits.

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a landward movement of about 9 miles opposite Ship Island. Changes are relatively frequent; for example, two lines were amended in 1966 (31 Fed. Reg. 4402 and 10322), one was amended in 1967 (32 Fed. Reg. 7127), and one has been amended in 1968 (33 Fed. Reg. 8273).

[12] For example, Treasury Circular No. 107, July 12, 1900, described a line "From Sand Island Light House WSW. ½ W. (approximately) to Chandeleur Light House * * *." 3 Treas. Dec. (1900) 592, 595. That was changed by Department of Commerce Circular No. 230 (6th ed., Nov. 18, 1935), p. 16, to a line "Starting from a point which is located 1 mile, 90° true, from Mobile Point Lighthouse, a line drawn to Mobile Entrance Lighted Whistle Buoy; thence to Ship Island Lighthouse; thence to Chandeleur Lighthouse." As can be seen from Figure 2, on the next page, the early line enclosed considerably more water than the later one.

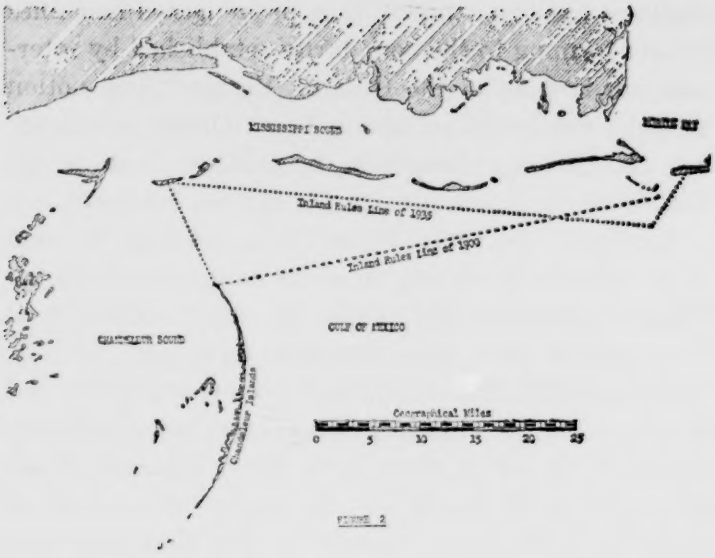

FIGURE 2

Such suppositions, however, are sheer fantasy. In promulgating new lines and revising old, the Coast Guard has been exclusively concerned with the needs of navigation. Thus, the order of December 1, 1953 declared (18 Fed. Reg. 7893):

> The comments, data, and views submitted which were based on reasons not directly connected with promoting safe navigation were rejected.

In 1967 the Commandant proposed a radical revision of the line off Louisiana in order to bring it much closer to shore. The notice of hearing made it plain that the proposal was stimulated solely by consideration of the needs of navigation (32 Fed. Reg. 8763):

> The present demarcation line is not easily located and therefore is not serving its purpose of informing mariners about the rules of the road applicable to their present positions.

The proposal was withdrawn because of objections from shipping interests, but the order made it plain that "The line of demarcation which is authorized under 33 U.S. Code 151 is intended solely for the purpose of distinguishing between the 'high seas' and 'inland waters,' which are subject to different 'Rules of the Road.'" and that "revisions may be made in this line when the needs of navigation require such actions." 32 Fed. Reg. 14775.

For almost 30 years the general publications of the Coast Guard have explicitly stated that the lines drawn for distinguishing between areas subject to different "Rules of the Road" should not be confused with the line of inland waters marking the national boundaries or jurisdiction of the United States. Thus, in 1943, the Coast Guard published the manual *Admiralty Law Enforcement*. One part discusses the rules defining inland waters, the three mile belt, and the high seas for purposes of jurisdiction. Pp. 24–25. The next section continues (pp. 25–26)—

> NAVIGATION RULE: Now let us consider another line of demarcation. As shown in Chapter V, there are different rules for navigation on the "inland waters" and the "high seas": the Inland Rules and the International Rules. But here we do not apply the previous definition, but adopt a new one for convenience. The Secretary of Commerce has fixed a series of lines along our coast, lines not following the natural curvature of our shores, and not following any three-mile natural perimeter, and the Inland Rules apply inside this line, while the International Rules apply outside the line. Maps showing

these lines may be found in the "Pilot Rules."

Quite obviously, this artificial line does not truly separate the high seas from the inland waters of the United States. It simply marks the area within which the Inland Rules apply, and outside of which the International Rules control. Thus, for the purpose of applying the rules of navigation, the high seas are the waters outside of the line fixed by the Secretary of Commerce for that purpose.

The order of December 1, 1953, as we have already noted (p. 26, *supra*), provided that the very line upon which Louisiana relies, was drawn "solely for purposes connected with navigation and shipping" and "not for the purpose of defining Federal and State boundaries" nor to "define or describe Federal or State jurisdiction over navigable waters." [13]

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[13] The full text of the relevant passage follows (18 Fed. Reg. 7893):

The comments, data, and views submitted which were based on reasons not directly connected with promoting safe navigation were rejected.

The establishment of descriptive lines of demarcation is solely for purposes connected with navigation and shipping. Section 2 of the act of February 19, 1895, as amended (33 U.S.C. 151), authorizes the establishment of these descriptive lines primarily to indicate where different statutory and regulatory rules for preventing collisions of vessels shall apply and must be followed by public and private vessels. These lines are not for the purpose of defining Federal or State boundaries, nor do they define or describe Federal or State jurisdiction over navigable waters. Upon the waters inshore of the lines described, the Inland Rules and Pilot Rules apply. Upon the waters outside of the lines described, the International Rules apply.

The United States Coast Guard *Law Enforcement Manual* (1954), p. 3–7, states:

> The dividing line between inland and international waters as established by the Commandant, found in 33 CFR 82, is used only for the purpose of the Rules of the Road, and the enforcement of the inland rules of the road. It has no connection with territorial waters, or high seas, or other terms denoting general jurisdiction.

Again, in the United States Coast Guard *Selected Materials on Coast Guard Law Enforcement* (1964), p. 4–5, it is said:

> The line established by the Commandant of the Coast Guard has no significance with respect to or dependence on the line establishing the limit of the territorial waters of the United States. In some places, the line is inshore of the territorial waters of the United States while in others, the line extends well outside the territorial limits of the United States. The sole purpose of the line is to establish a division line between the application of the Inland Rules and the International Rules of the Road.

Finally, on June 14, 1967, in proposing the revision of the Coast Guard Line in the Gulf of Mexico, the Acting Commandant of the Coast Guard noted (32 Fed. Reg. 8763), "The existing Gulf demarcation line extends almost 20 miles out into international waters, as recognized by the State Department."

We are aware of only one incident that could possibly be regarded as a departure from this long and consistent understanding. On June 4, 1929, Seymour Lowman, Assistant Secretary of the Treasury, in

responding to an inquiry from the Secretary of State on behalf of Norway, referred to the Coast Guard orders of May 20, 1925, which Louisiana invokes in support of her position (La. Mot. 19–20). The orders were both tentative and confidential.[14] They authorized law enforcement within the territorial waters of the United States and defined them as—

> all waters within a radius of three nautical miles from the "coast" of the United States as above defined and all waters inshore of the lines designated and defined by the Secretary of Commerce in accordance with the Act of Congress of February 19, 1895, as limiting the "inland waters" of the United States.

Although this definition gave the lines promulgated under the Act of February 19, 1895, an effect beyond the otherwise consistent interpretation of their function, the orders were equally inconsistent with Louisiana's thesis. The orders did not treat the navigation lines as demarcations of the outer limit of the inland waters of the United States for territorial purposes and then add a three mile belt to reach the limit of the territorial sea, as Louisiana seeks to do. Rather, the orders treated the navigation lines as the outer limit of the marginal sea wherever they were sea-

[14] "* * * I have the honor to state for your confidential information, that the Coast Guard, of this Department, has made a somewhat extended study of this subject and, being unable to find any agreement among the various authorities and text writers, has issued tentative confidential orders to its fleet, not only as a matter of necessity but also for the purpose of obtaining court decisions which it is hoped will eventually clarify the matter."

ward of the three-mile limit as measured from the low-water line and outer limit of inland waters; otherwise, the orders ignored the Coast Guard lines and measured the territorial sea from the "coast," which was defined as the line of mean low water and closing lines between headlands of bays and estuaries not over 20 miles wide.

There is no justification for such a claim anywhere in international law or history. The tentative orders appear to have lapsed into desuetude very shortly, and should probably be put down to basic misconception.[15] In any event, they were no more than a single aberration from the otherwise uniform rule.[16]

State Department. The Department of State has never treated the navigation lines promulgated under the 1895 statute as having any effect in establishing the "inland waters" of the United States for territorial purposes. In all international deliberations upon the rules delimiting inland waters and the territorial sea the Coast Guard lines were generally ignored.

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[15] There were other plain errors in the orders. The United States has never recognized 20 miles as a permissible limit for the width of bays. The orders also erred in measuring the territorial sea from structures such as lighthouses and beacons on permanently submerged portions of the seabed.

[16] No record can be discovered of whether or for how long those orders were actually in effect; but since they were never published, they expired in any event no later than December 31, 1952. Amendment 26 to U.S. Coast Guard Regulations, January 28, 1953, provided that directives (except technical and special series) not incorporated in regulations or a manual, should expire at the end of the fourth calendar year following issuance, beginning December 31, 1952.

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The one specific reference to the Coast Guard lines is found in a letter by W. R. Castle on July 13, 1929, responding to the Norwegian Government on behalf of the Secretary of State. The letter was written just after the Department had collected all relevant information from other departments and agencies, including the confidential Coast Guard orders. Mr. Castle sent to Norway copies of the pilot rules for inland waters, pointing out the lines therein described to delimit the waters in which the inland rules should be followed. He then said:

> It should be understood that the foregoing lines do not represent territorial boundaries, but are for navigational purposes, to indicate where inland rules begin and international rules cease to apply.[17]

Viewed as efforts to fix our inland waters for territorial purposes the Coast Guard lines are often squarely inconsistent with the principles set forth in the Convention on the Territorial Sea and the Con-

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[17] 1 Hackworth, *Digest of International Law* (1940), 644–645. The letter also observed:

> The geographic points for drawing up the basic lines for the territorial waters and the fishery boundary, with the exception of certain limited areas covered by special treaty or agreement, have not been determined by the United States. Agencies of the Federal Government have made their own determinations for administrative purposes; for example, the Steamboat Inspection Service has made certain decisions regarding lines separating inland waters from the high seas. However, no final determination has been made which would be binding alike upon all agencies of the Federal Government.
>
> No general statute defines the territorial waters of the United States.

tiguous Zone, ratified by the President in 1961, particularly off the Louisiana Coast. See pp. 28–30, *supra*. Counsel for Louisiana have not yet explained how they view the interrelationship. Since they argue that the Commandant of the Coast Guard established our inland waters for territorial purposes, apparently they must also say that the Convention changed large areas of inland waters into high seas for international purposes. Does this mean that the Coast Guard regulations inconsistent with the Convention are now invalid as demarcations of the areas subject, respectively, to the Inland and International Rules of Navigation, having been impliedly repealed by its ratification? Logically, the answer would have to be affirmative and the shipping may disregard the Coast Guard lines. Furthermore, one wonders what is the effect, under counsel's theory, of Coast guard regulations issued after the date of ratification that do not apply the new international criteria. If the power delegated by the 1895 legislation was to find or otherwise establish the international boundary, that authority would seem to have terminated when the boundary was fixed by international agreement, except as the Commandant might apply the international criteria to the relevant topographical conditions in particular locations. Does this mean that later regulations that do not apply the Convention are invalid? Again, an affirmative answer is the only conclusion logically consistent with counsel's theory unless it be said that the definitions in the international Convention approved by the Senate and ratified by the President will yield to some superior authority of the Com-

mandant to fix the national boundaries under the 1895 legislation, as amended.

These difficulties do not arise if the Coast Guard Regulations, in accordance with the virtually unbroken practice, are assigned the limited function of defining the meaning of inland waters solely for the purposes of the Inland Rules of Navigation.

Legal Interpretation. The infrequent rulings upon the effect of the lines drawn under the 1895 statute are inconclusive, but they tend to confirm our interpretation. In the case of *The Delaware,* 161 U.S. 459, decided only a few months after passage of the 1895 Act, the Court had to consider whether a collision in Gedney Channel was governed by the International or Inland Rules, under the Act of March 3, 1885, 23 Stat. 438. That Act, like the subsequent Act of February 19, 1895, made the Inland Rules applicable to the "harbors, lakes, and inland waters" of the United States. Gedney Channel, being outside the headlands of New York Bay, was not within inland waters under international law. Nevertheless, the Court held that it was inland waters for the purposes of the Inland Rules (161 U.S. at 463–464; emphasis added):

> We are of opinion, however, that the dredged entrance to a harbor is as much a part of the inland waters of the United States *within the meaning of this act* as the harbor within the entrance, and that the real point aimed at by Congress was to allow the original code to remain in force so far as it applied to *pilotage waters, or waters within which it is necessary for safe navigation to have a local pilot.* It is important that a pilot, while conducting a vessel

> in or out of a harbor, should not traverse waters governed by two inconsistent codes of signals, and if there are to be two codes, the line should be drawn between the high seas, and the inland waters wherein the services of a local pilot are requisite for safe navigation.

In reaching the conclusion that Gedney Channel was inland waters *for this limited purpose* the Court gave weight to the line drawn after the collision by the Secretary of the Treasury pursuant to the 1895 legislation.

Writers in the field have also recognized that the Coast Guard lines serve only a limited navigational function unrelated to jurisdictional limits. Thus, Strohl, *The International Law of Bays* (1963) 4, fn. 5 explains:

> The boundary lines for "Inland Waters" within the meaning of United States Inland Rules of the Road do not necessarily coincide with the base lines delimiting the regime of internal waters as understood in general international law. *United States* v. *Newark Meadows Improvement Co.* 173 Fed. 426 (1909).

3. The Coast Guard line is not a workable coast line for the purposes of the Submerged Lands Act

Since the Coast Guard line has only navigational significance, use of the Coast Guard line as a "coast line" for the purposes of the Submerged Lands Act would defeat the intent of Congress to use the national boundary determined under international law. But even if the Court were free to make an arbitrary selection, the Coast Guard line would have to be rejected as unsound.

(a) The Coast Guard lines do not provide a complete "coast line." They have been drawn only where necessary for the convenience of shipping, omitting vast stretches of the coast.[18] Such was the case in the Gulf of Mexico while the Submerged Lands Act was before Congress and for six months after enactment. Louisiana's theory would make it necessary to use two standards—the Coast Guard lines in some places and the true "coast line" determined in accordance with the Convention in others—in order to provide a complete base line from which to measure the three mile grant; and there would be endless technical problems in defining the method of joining the two kinds of lines. Thus, Louisiana's claim is not merely impractical but it ascribes to Congress a most implausible intent.

(b) Louisiana argues that, since the Coast Guard line is not affected by physical changes in the contours of the coast, its use as a baseline would give stability to titles. But since the Coast Guard lines are revised from time to time, their use would put title to mineral rights at the hazard of revision to meet the needs of shipping, and confuse revisionary proceedings before the Coast Guard that ought to be concerned only with

[18] For example, there are no lines described for any part of the coast of North Carolina, none for South Carolina except at Charleston, and none for Alaska except along the Alexander Archipelago of the panhandle, from Cape Spencer south. Along the California coast there are lines only for a limited number of harbor entrances, and in Monterey Bay, all of which was held to be inland waters in *United States* v. *California*, 381 U.S. 139, 170, only three small harbor areas are enclosed by lines. 33 C.F.R., Pt. 82.

the needs of shipping, by introducing pressures related to the ownership, regulation and development of mineral resources.[19]

This difficulty could be minimized by selecting the Coast Guard lines on some specific date, but this solution would force the Court to make an entirely arbitrary selection of the date of the Coast Guard line

[19] An example occurred only last year. On June 14, 1967, the Acting Commandant of the Coast Guard announced a proposal to move the Louisiana lines much closer to shore, in the interest of navigation. 32 Fed. Reg. 8763. His notice, after emphasizing at length the purely navigational character of lines drawn under the 1895 Act, noted the navigational impracticality of the existing line:

> At some points the line is located more than 20 miles from the nearest land; even worse, one leg of this line is drawn between two offshore aids to navigation that are over 120 miles apart. * * * It is difficult for fishing vessels in the Gulf of Mexico area to determine which set of rules applies to them. If such a determination could be made, it would be arbitrary to require a vessel engaged in fishing to change lights in the middle of a fishing operation taking place anywhere from 10 to 20 miles offshore. * * *

This proposal was vigorously opposed on grounds wholly unrelated to safety or convenience of navigation (see, e.g., extension of remarks by Congressman Rarick, 113 Cong. Rec. H9955–H9960, Aug. 3, 1967), and was ultimately withdrawn by the Acting Commandant on October 16, 1967, 32 Fed. Reg. 14775. In announcing that withdrawal, he reiterated the purely navigational purpose of lines drawn under the 1895 Act, and stated that withdrawal of the proposal was based solely on navigational considerations. He noted, however:

> A number of comments and views submitted did not address themselves to the purpose for which the line of demarcation is authorized under 33 U.S. Code 151, but to other subjects, including State boundaries, State rights, fishing rights, etc. These comments and views were not considered as germane to the proposals under consideration and no action is taken with respect thereto.

to govern. It would seem contrary to all the basic assumptions of judicial determinations for the Court to select different dates for different States. If a single date were to be chosen, the most logical would be May 22, 1953, when the Submerged Lands Act became effective. Louisiana assigns no plausible reason of general application which would justify the Court in preferring the line drawn on December 1, 1953. To use the line that happens to prevail when the suit is brought or the decree is entered not only introduces an irrational factor but puts the Coast Guard in the position of determining the ownership of potentially vast mineral resources for States, like Alaska, not yet engaged in litigation.

The use of the Convention ratified in 1961 as the source of the international rules used to define the "coast line" for the purposes of the Submerged Lands Act involved very different considerations. The Convention emerged from a long history of international relations and, although it changed the policy of the United States in some respects, it merely codified it in others. Change is not expected. *United States* v. *California,* 381 U.S. 139, 165. In effect, therefore, the Convention reduced the otherwise amorphous body of international law to a set of workable definitions that could be applied in all cases without regard to time.

(c) The use of Coast Guard lines would dissociate the ownership of resources in the submerged lands from the territorial boundaries of the United States and the marginal sea, thus creating a multiplicity of boundaries and jurisdictional lines. The core of the entire submerged lands controversy has always been

the ownership of lands under the marginal sea. The location of the marginal sea is currently fixed by the Convention. As the Court recognized in *United States* v. *California,* 381 U.S. 139, 165, it is highly desirable to establish "a single coastline for both the administration of the Submerged Lands Act and the conduct of our future international relations (barring an unexpected change in the rules established by the Convention)."

(d) The acceptance of Louisiana's claim to the December 1, 1953, Coast Guard line would encourage endless controversy. Unless the *California* case were reopened, there would be two standards for determining the coast line. In some localities States would gain in the ownership of resources from use of the Coast Guard line and the United States would lose. In other localities States would gain and the United States lose from use of the Convention. One result would be continual litigation over the rule to be applied in each particular locality. In addition, the simultaneous use of different standards would provoke further appeals to Congress to treat all States according to a uniform rule.

In sum, the Coast Guard Line satisfies no legal criteria for jurisdictional limits. The purely navigational purpose of such lines has been recognized by the Court and repeatedly asserted both by the Coast Guard in establishing and using them and by the Secretary of State in distinguishing them from jurisdictional limits. Attributing jurisdictional significance to the Coast Guard lines, with resultant proprietary consequences under the Submerged Lands Act, would

be inconsistent with our international obligations under the Convention ratified in 1961; it would also seriously impair the very purpose of navigational convenience and safety that they were intended by Congress to promote. Viewed solely as proprietary lines, they are not only incomplete but their use would introduce large elements of uncertainty, discrimination, and arbitrary choice into the operation of the Submerged Lands Act.

II

THE COAST AND BOUNDARY LINES SHOULD BE DRAWN IN ACCORDANCE WITH THE DECREE SUBMITTED BY THE UNITED STATES

Once it is established that the coastline of Louisiana is to be demarcated in accordance with the Convention on the Territorial Sea and the Contiguous Zone, the present controversy comes down to applying the definitions supplied by the Convention to the actual geographic facts of the Louisiana coast. A number of significant questions of law are raised, but discussing them abstractly seems less helpful to the Court than following the proposed baselines west to east and taking up the legal issues in specific context.

Before turning to particular line segments, however, two matters that affect the entire process must be considered.

Ambulatory lines. Under the Geneva Convention the coastline, from which the three-mile belt conveyed by the Submerged Lands Act is measured, depends upon the actual physical characteristics of the coast. Since the physical conditions are constantly

changing because of action of the elements or human activity, the coastline is necessarily ambulatory; and future shifts in the coastline will alter the property lines under the Submerged Lands Act. The point was recognized in *United States* v. *California,* 381 U.S. 139, 176–177.

In some respects, this makes the use of the three-mile line inconvenient. Those who have leased from one owner an area near the boundary may someday find that the underlying title has passed to the other. Practical considerations, however, may well deter the parties from seeking daily or even yearly readjudications of the location of ambulatory boundaries, believing it to be more convenient to adhere to a line established in the past than to relitigate the issues for the sake of small readjustments that cannot be settled amicably. In addition, it may prove possible to minimize the difficulties under existing laws by some sort of joint or cooperative leasing of lands near the dividing line. If not, any problems can be solved by legislation. Louisiana's statement that such a course is "not acceptable" (La. Resp. and Opp. 33), announced in advance of any formula, is so obviously contrary to all the interests concerned with development of the area that the present attitude seems unlikely to last beyond the immediate litigation. In any event, the problem was created by Congress and cannot be solved by the method proposed by Louisiana.

With reference to its alternative proposal, Louisiana concedes that "the coast line and boundary are subject to changes induced naturally or artifically" (La. Resp. and Opp. 32), but urges the Court to

consider "coastal dynamics" and to try to outguess nature in predicting where the shoreline is likely to be at some unspecified time in the future. La. Resp. and Opp. 33–35. The argument is self contradictory. The whole concept of an ambulatory boundary is that it moves from day to day as the physical water line moves; it is always at the place dictated by present physical facts, not by past or future events. "The Court has repeatedly reaffirmed this rule, *County of St. Clair* v. *Lovingston*, 23 Wall. 46 (1874); *Jefferis* v. *East Omaha Land Co.*, 134 U.S. 178 (1890), and the soundness of the principle is scarcely open to question." *Hughes* v. *Washington*, 389 U.S. 290, 293. Nothing in the Submerged Lands Act or the Geneva Convention authorizes forecasts of future location. If a line that is ambulatory by definition is to be fixed in one location in the interests of providing stability to investments, that can be done only by taking as a baseline the coastline as it was on some relevant date such as the effective date of the Submerged Lands Act (May 22, 1953), or the date the decree is entered—not by judicial speculation about future coastal dynamics.

Coastal maps. In order to demarcate the coast and boundary lines on the date a particularized decree is entered, it is necessary to use maps of the area that accurately depict the relevant physical conditions to which to apply the rules supplied by the Convention. For this purpose we propose the use of a set of 54 large-scale (1:20,000, that is, 6 inches=10,000 feet) maps prepared in 1961 by the United States Coast and Geodetic Survey under supervision of a joint Federal and State Committee for the purposes of this

case.[20] Louisiana criticizes our use of these maps, La. Resp. and Opp. 35–37 but concedes that these are the "only" maps now available, *id.* 35,[21] and uses them for its own description of the coast alternative to the Coast Guard line. A set of the maps is being submitted to the Court as Exhibit A to this brief.

Louisiana criticizes the maps, asserting that she is not bound by them. We agree that neither party is bound.[22] It is essential, however, to have topographical information as a point of departure, and we cannot believe that anyone wishes a whole new survey

[20] The maps are in three groups: 8 maps of the Mississippi River Delta Area, based on 1959 surveys; 5 maps of the Atchafalaya Bay Area, including Marsh Island, based on 1960–61 surveys; and 41 maps of the remainder of the Louisiana coast, based on 1954 surveys. Maps are identified as "No. 1 of 5," "No. 1 of 8," "No. 1 of 41" etc.

[21] This of course is not literally true. Louisiana itself mentions as preferable the 1200 series of U.S. Coast and Geodetic Survey Charts (scale 1:80,000). While these charts are readily available and would meet some of Louisiana's objections to the 1961 maps, *id.* 37, their scale is only one-quarter that of the Committee maps, they do not show plane coordinates, and the low-water line is indicated in only a few places.

[22] The quotation at La. Resp. and Opp. 37, fn. 10, from the "Report of the Joint Federal and State Committee Regarding the Effect That the Geneva Convention on the Territorial Sea and the Contiguous Zone Would Have If Applied to the Coastline of the State of Louisiana," had nothing to do with the making of the maps. That was a subsequent report by a different joint committee, made for a different purpose, on April 30, 1962, four months after the maps were completed and submitted. The language quoted by Louisiana referred to the report produced by the second committee, not to the maps produced by the first committee. Neither in our former memorandum or motion, or in this brief, have we made reference to any views expressed by the second joint committee, or by either the State or federal section of it.

to be made. The maps provide an unassailable basis for illustrating and resolving the questions of law. For the most part they depict the facts with great accuracy as of the time they were made. The practical course, therefore, is to treat them as a *prima facie* identification of the Louisiana coast, subject to the right of either party to point out the need for specific and relevant corrections.[23] Since the line is ambulatory, either party will always be legally free to show a change in location under the principles established by the decree.

We turn now to the actual demarcation of the coastline in accordance with the applicable principles of the Convention, beginning at Louisiana's lateral boundary on the west.

A. SABINE PASS TO TIGRE POINT

Both parties agree that the segment of the coast line extending from Sabine Pass jetty to Tigre Point (x=1,708,756, y=318,661) generally follows the line of mean low water on the coast. At Sabine Pass, on the extreme west end of the line, the entire jetty is to be treated as a harbor work which is part of the coast. Convention, Art. 8.

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[23] For example, the spoil bank at Pass Tante Phine is no longer in existence and so should be disregarded, whether or not the Court agrees with our view that spoil banks generally should be ignored in delimiting the territorial sea. U.S. Mot. 75; see *infra*, pp. 109–111. See also U.S. Mot. 72, fn. 17, referring to post-1961 erosion at East Timbalier Island, which we consider it appropriate to disregard at this time because its exact extent is not known, and because measures to restore it, at least in part, are now under consideration.

The only points in dispute in this segment are three dredged channels at Sabine Pass, Calcasieu Pass, and Freshwater Bayou, which extend out as much as 18 miles into the Gulf of Mexico beyond the jetties. Louisiana claims that the dredged channels, marked only by buoys, are "harbour works" within Article 8 of the Convention, which provides:

> For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast.

We submit that the term "harbour works" includes only raised structures such as jetties and breakwaters, and therefore does not include a channel dredged underneath the sea. The rationale of Article 8, the provisions of a related article, and the discussions preceding the execution of the Convention show our interpretation to be correct.

The rationale of Article 8 is that certain artificial modifications of the shore line should be accorded the same legal effect as natural changes. Since a nation's maritime limit is not extended by a natural trench in the sea bed, an artificial trench should not extend it.[24]

[24] Louisiana places some reliance on *The Delaware*, 161 U.S. 459, in which the Court said (p. 463) that "the dredged entrance to a harbor is as much a part of the inland waters of the United States within the meaning of this act as the harbor within the entrance * * *." La. Resp. and Opp. 58. The Court was there concerned with a collision within three miles of land (see 161 U.S. at 460), so that there was no doubt of jurisdiction. The only question was what Congress had meant when it provided, in section 2 of the Act of March 3, 1885, 23 Stat. 442, that special navigational rules should be followed

The entire discussion during the drafting of Article 8 was in terms of structures such as jetties and breakwaters, and it is obvious that only works of that character were in contemplation. For example, the summary record of the 1955 discussions of the International Law Commission describes Sir Gerald Fitzmaurice as having said that—

> The Commission's rule that jetties and piers be treated as part of the coastline had been based on the assumption that those installations would be of such a type as to constitute a physical part of such coastline; it would indeed have been inconvenient to treat that kind of installation otherwise than in the manner advocated by the Commission. [1 *Yearbook of the International Law Commission* (1955) 74.]

See also 1 *Yearbook of the International Law Commission* (1954) 88–89; 1 *id.* (1956) 193.

The same understanding appeared again in the committee discussions of the article at the 1958 Conference which formulated the Convention:

> 4. Mr. CARMONA (Venezuela) stressed that the International Law Commission had approved the text of article 8 only after the most

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in the "inland waters" of the United States. Having in mind the practicalities of navigation, the Court concluded that "the real point aimed at by Congress was to allow the original code to remain in force so far as it applied to pilotage waters, or waters within which it is necessary for safe navigation to have a local pilot." 161 U.S. at 463. This included the entrance channel, as well as the harbor proper. Thus, the crucial phrase in the Court's statement was, "*within the meaning of this act.*" The present case, involving jurisdictional rather than navigational matters, must be judged by quite different criteria. See pp. 26–30, *supra*.

> exhaustive study. The construction of harbour works being of vital importance not only to the coastal State but also to the ships of all nations, no doubt should be allowed to subsist regarding the status of such works. Governments which had made heavy economic sacrifices to secure their port facilities against the elements had always acted on the assumption that the legal position was precisely as stated in the Commission's text. In those circumstances, any interference with that text might have very serious consequences. [*U.N. Conference on the Law of the Sea, Official Records,* vol. 3: First Committee (Territorial Sea and Contiguous Zone), Summary Records of Meetings and Annexes (U.N. Doc. A/CONF. 13/39), p. 142.]

Mr. Carmona's statement is significant in two respects. His reference to harbor works as securing port facilities against the elements can apply only to jetties, breakwaters, and similar structures, not to dredged channels. His statement that the article represented existing law could apply only to raised structures, for no prior (or subsequent) law holds that the territorial sea should be measured from the outer ends of dredged channels.

The International Law Commission's commentary on proposed Article 8 also stated that "The waters of a port up to a line drawn between the outermost installations form part of the internal waters * * *." *Report of the International Law Commission Covering the Work of Its Eighth Session: U.N. General Assembly Official Records: Eleventh Session, Supplement No. 9* (A/3159), p. 16; 2 *Yearbook of the International Law Commission* (1956) 270. The comment obviously

contemplates structures adjacent to and enclosing a water area which would thereby become internal waters. It is utterly inapplicable to a dredged channel, which underlies rather than adjoins navigable waters; since the channel is single, nothing could be drawn "between" it, and it in no way provides any degree of enclosure for any area whatever.[25]

Article 3 also demonstrates that only raised structures are intended. The "harbour works" covered by Article 8 are, by its terms, to be treated as "part of the coast." The operative effect of the definition is in Article 3, which provides (15 U.S.T. (Pt. 2) 1608):

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[25] Louisiana's own treatment of dredged channels betrays a realization that they are not in fact harbor works within the meaning of Article 8. Whereas Louisiana has used true harbor works as headlands from which to draw closing lines—for example, the Empire Canal jetties in "Ascension Bay," the Southwest Pass east jetty at East Bay, and the South Pass east jetty at Garden Island Bay—it has not so used the more extended dredged channels at the same locations, as it logically should have done if they were part of the coast under Article 8. See La. Resp. and Opp., Exhs. 2 and 3. The obvious reason for this restraint is that any attempt to use a dredged channel as a "headland" or "natural entrance point" to an area of enclosed water emphasizes the incongruity of treating such channels as "harbour works" within the meaning of Article 8.

In three instances, Louisiana's descriptions of dredged channels, terminating at the landward end of the described part of the channel, are followed by paragraphs beginning "Thence * * *." In paragraph (mm), La. Resp. and Opp. 86, the "Thence" apparently does refer to the final point of the preceding channel description; but in paragraph (u), La. Resp. and Opp. 79, and paragraph (bb), La. Resp. and Opp. 82, the "Thence" seems necessarily to refer back to the paragraph preceding the channel description. In any event, if Louisiana had intended to use the channels as headlands in the way that it has used other harbor works, it presumably would have drawn its closing lines from their outer rather inner ends.

> Except where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.

Since there is no "low-water line" along a channel dredged in the permanently submerged sea bed, there would be no way to draw a baseline around a channel, under Article 3, even if the channel were to be considered part of the coast under Article 8.

This is no technical quibble. The requirement that measurement be made from the low-water line provides objective assurance that artificial structures will not be used unless they are of sufficient height to have a low-water line. Thus, if dredged channels were to be accepted as part of the baseline, any reduction in the level of the seabed, however slight, would qualify, and there would be virtually no limit on the extent to which a nation could extend its maritime limits by the most perfunctory sort of dredging. Plainly, if use of channels had been intended, some clear limitations would have been specified. Their absence further demonstrates that use of channels is contrary to the intent.

The 1958 Conference on the Law of the Sea considered and rejected a provision on the subject of buoyed channels which was considerably more modest than Louisiana's claim. The First Committee, in charge of drafting this Convention, adopted an Argentine proposal to revise Article 9 to read:

> 1. Buoyed channels giving access to ports, and roadsteads which are normally used for the loading, unloading and anchoring of ships and

> which would otherwise be situated wholly or partly outside the outer limit of the territorial sea, are included in the territorial sea. The coastal State must give due publicity to the limits of such zones.
>
> 2. This article shall not apply to buoyed channels giving access to ports of more than one State.

U.N. Doc. A/CONF.13/C.1/L.7/Rev.1. See *United Nations Conference on the Law of the Sea, Official Records,* vol. 3, First Committee (Territorial Sea and Contiguous Zone), Summary Records of Meetings and Annexes (A/CONF.13/39) 142, 144, 213, 259. The second paragraph of the Article, as quoted above, was a Uruguayan amendment. U.N. Doc. A/CONF.13/C.1/L.68; see *id.* 143–144, 230. However, the plenary session accepted a British proposal that the subject of buoyed channels should be voted on separately, and in that vote the proposal was not approved. *United Nations Conference on the Law of the Sea, Official Records,* vol. 2, Plenary Meetings, Summary Records of Meetings and Annexes (A/CONF.13/38) 63–64. Accordingly, the provision does not appear in the Convention as adopted. *Id.* 133; 15 U.S.T. (Pt. 2) 1609. Since the Conference thus rejected a proposal to treat buoyed channels even as territorial sea, there is obviously no justification for supposing that it gave them, *sub silentio,* the much more privileged status of inland waters and extended the territorial sea three miles around them in all directions.

B. TIGRE POINT TO SHELL KEYS

In our view the coast line runs eastward from Tigre Point (X=1,708, 756, Y=318, 661) along the low-water line to the point x = 1,763,190, y = 333,-540 (about 1½ miles west of the Southwest Pass into Vermilion Bay), except for a brief interruption where a low-tide elevation close to shore is controlling. U.S. Mot. 16–17, paragraphs (f)–(h). From that point southeastwardly the exact course of the coast line is immaterial because the three-mile line is controlled by salient points on a series of islets and low-tide elevations south of Marsh Island, as far as a low-tide elevation south of the Shell Keys (x = 1,834,019, y = 270,301).

Louisiana would draw a straight line between Tigre Point and the low-tide elevation at the southern extremity of the Shell Keys on the theory that the waters enclosed are "Outer Vermilion Bay." La. Resp. and Opp. 57; 85, paragraph (jj); Exh. 5.

The straight baseline would be proper only if the area qualified as a bay under Article 7 of the Convention. The area fails to qualify for three independently sufficient reasons: (1) it is not a "well-marked indentation" and fails to meet the semi-circle test; (2) the closing lines exceed 24 miles in total length; and (3) an island or low-tide elevation may not be used as the headland of a bay.

1. Article 7 of the Convention defines a bay as—

> a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute

> more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

A look at the chart reveals that the area Louisiana describes as "Outer Vermilion Bay" is not a "well-marked indentation." The shore to the north, even counting Marsh Island, is "a mere curvature of the coast." Certainly, the waters outside Marsh Island are not "landlocked." These requirements must be satisfied in addition to the semicircle test, which was added as a separate requirement during the deliberations on Article 7.[26]

In addition, "Outer Vermilion Bay" fails to meet the semicircle test prescribed in the second sentence of Article 7. The area is only about half that of a semicircle drawn on the claimed line from Tigre Point to Shell Keys.

Louisiana seeks to obviate the latter difficulty by including the water area of Vermilion Bay as "tributary waters" of the area it calls "Outer Vermilion Bay." The map itself shows the artificiality of the claim. It has two readily articulated defects.

First, tributary waters cannot be included where, as here, they are entirely distinct bodies of water connected only by narrow channels. Vermilion Bay is a bay in its own right, a visibly separate entity connected to the waters in question only by the narrow channel at Southwest Pass, about 3715 feet wide

[26] For more detailed discussion of the development of Article 7, see pp. 99–101, *infra*.

near its Gulf entrance and about 2630 feet wide near its entrance into Vermilion Bay. Whatever the proper standard may be, it takes more than a connecting channel to make two visibly separate bodies of water into a single bay, just as it takes more than a connecting door to make two rooms into one. To link part of the open sea to a true bay in order to satisfy the semicircle test whenever the bay is reached by a passage would, in all such cases, defeat the requirement that inland waters not include mere curvatures in the coast.

Second, treating the related waters as part of a single "bay" would take the entire area out of Article 7 because its closing line would greatly exceed 24 miles. On a logical application of Louisiana's view, Vermilion Bay, West Cote Blanche Bay, East Cote Blanche Bay, and Atchafalaya Bay would all have to be treated as parts of a single indentation extending from Southwest Pass to Point au Fer, to which Louisiana would add "Outer Vermilion Bay." The configuration, apart from Outer Vermilion Bay, is essentially unitary. Certainly, Vermilion Bay cannot be treated as part of one body of water with so-called Outer Vermilion Bay, from which it is almost completely shut off by Marsh Island, and dissociated from West Cote Blanche Bay, where the entrance is many times wider. Treating the whole as one body of water, the closing line or lines would have to run from Tigre Point clear across Atchafalaya Bay—a distance of 48.49 miles or more than double the 24 mile rule provided by Article 7.

2. The closing line of the bay claimed by Louisiana fails to satisfy the 24 mile limitation even if one disregards the connecting waters. Louisiana draws a line from Tigre Point to a low tide elevation south of Shell Keys. The line is 22.08 miles long. The line does not enclose any body of water because the low tide elevation is, at best, part of an island. Something more is therefore required for a closing line even to Marsh Island (assuming that to be an acceptable headland). The shortest possible water crossing from the northern end of Shell Keys to Marsh Island is about 14,580 feet, or about 2.4 miles. Adding this to the 22.08 mile line from Tigre Point gives a closing line that exceeds the limitation by about half a mile.

3. So-called "Outer Vermilion Bay" fails to satisfy the Convention for the further reason that neither Shell Keys nor Marsh Island can properly be used as headlands for closing lines. The Convention does not permit the use of islands or low-tide elevations as headlands for bays. Since the principle is applicable to other segments of the coast line, we pause to discuss it fully.

The Convention contains three articles regarding islands.

Article 4 permits straight baselines to be drawn to and between islands in the immediate vicinity of the coast, under specified circumstances, but it forbids such use of low-tide elevations except where there is a lighthouse or similar structure permanently above sea level. There is no lighthouse or similar structure on Shell Keys. Article 4 is inapplicable to this case, moreover, even where its other requirements are satis-

fied, because the United States has never promulgated straight baselines. *United States* v. *California*, 381 U.S. 139, 167–169.

Article 10 provides that the territorial sea of an island is measured in the same way as that of the mainland. An island may therefore have its own bays, but there is nothing in this article to suggest that a bay may be formed merely by drawing lines from the mainland to an island off the coast.

Any such reading is repelled by the first portion of Article 7, which defines a bay as a "well-marked indentation" containing landlocked waters. An off-shore area formed by drawing lines to and between islands is a projection, not an indentation, unless the islands are in the mouth of an indentation in the mainland coast. Thus, in the instant situation Marsh Island may appropriately be viewed as lying on the closing line of a large indentation extending from the west side of Southwest Pass across to Point au Fer. The combined width of the openings at Southwest Pass and between South Point and Point au Fer is less than 24 miles. Since this view leaves out the waters Louisiana would call "Outer Vermilion Bay," Louisiana seeks to draw a closing line from Tigre Point. Even if that were otherwise a proper starting point, the closing line would be in excess of 48 miles—too wide to qualify as a bay.

Louisiana can get over this difficulty and still start a closing line at Tigre Point only by ignoring the obviously unitary character of the indentation from Southwest Pass to Point au Fer and claiming a bay formed by drawing closing lines from Tigre Point to

Shell Keys, from Shell Keys to Marsh Island, and across Southwest Pass. But if one makes the strained assumption that the whole area is not *one* indentation, then logically the general direction of the coast at this point sweeps north of Shell Keys and even Marsh Island; and any closing lines using them would not close an indentation but impermissibly project a bay out into the Gulf.[27]

Paragraph 3 of Article 7—the third provision in the Convention dealing with islands—also reveals the fallacy of the claim that lines drawn out to an island may be used to create a bay where there is no well-marked identation containing landlocked waters in the mainland coast behind a closing line between mainland headlands that satisfies the 24 mile rule. Article 7, paragraph 3 provides:

> 3. * * * Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the

[27] A single line from Tigre Point to Shell Keys does not enclose "landlocked waters", as required by Article 7, because of the entrance between Shell Keys and Marsh Island. Moreover, the waters between such a line and the mainland-Marsh Island coasts do not meet the semi-circle test. If Vermilion Bay is counted as an area behind the line in order to meet that test, then the waters are no longer "landlocked" because they join the Cote Blanche Bays and Atchafalaya Bay and lead back to the Gulf. Thus, whichever line of analysis is followed, its logical pursuit leads back to the conclusion that the only indentation qualifying as a bay under Article 7 runs from a western headland at Southwest Pass to Point au Fer. A glance at the map shows that this theoretical conclusion corresponds to the obvious geographical fact.

lines across the different mouths. Islands within an indentation shall be included as if they were part of the water areas of the indentation. [15 U.S.T. (Pt. 2) 1609.]

While the phraseology recognizes that islands may create *mouths,* it does not provide that they may create *bays.* On the contrary, it assumes that the indentation will first exist; then in measuring it for purposes of applying the semicircle test, the total width of the mouth may be reduced to the extent that it is occupied by islands. This is made quite clear by the commentary of the International Law Commission:

> (2) If, as a result of the presence of islands, an indentation whose features as a "bay" have to be established has more than one mouth, the total length of the lines drawn across all the different mouths will be regarded as the width of the bay. Here, the Commission's intention was to indicate that the presence of islands at the mouth of an indentation tends to link it more closely to the mainland, and this consideration may justify some alteration in the ratio between the width and the penetration of the indentation. In such a case an indentation which, if it had no islands at its mouth, would not fulfil the necessary conditions, is to be recognized as a bay. * * * [*Report of the International Law Commission covering the Work of Its Eighth Session: U.N. General Assembly, Official Records: Eleventh Session, Supplement No. 9* (A/3159), p. 17; 2 *Yearbook of the International Law Commission* (1956), p. 269.]

The explanation plainly assumes islands "at the mouth of an indentation" that would exist without

them. The islands cannot help to create the indentation. Their only effect is to mitigate the rigor of the 24-mile limit and semicircle test as applied to the whole headland-to-headland width of the mouth. For example, in applying the 24 mile rule and semicircle test to the indentation between the west headland at Southwest Pass and Point au Fer, the width of Marsh Island is not to be included as part of the length of the closing line.

This use of islands in the mouth of a bay is entirely different from Louisiana's effort to draw lines out from the mainland, to and between offlying islands, so as to enclose waters seaward of the mainland shore. That possibility was repeatedly considered by the International Law Commission in drafting the Convention, but all such suggestions were rejected. Louisiana is treating the Convention as if it included procedures that the draftsmen chose to omit.[28]

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[28] The history of the subject is summarized in the *Reference Guide to the Articles Concerning the Law of the Sea Adopted by the International Law Commission at Its Eighth Session*, prepared by the Secretariat (A/C.6/L.378) 45, fn. 1, as follows:

> In his first report (A/CN.4/53) the special rapporteur proposed an article entitled "Groups of Islands". This was article 10, which read as follows:
>
> "With regard to a group of islands (archipelago) and islands situated along the coast, the ten-mile line shall be adopted as the base line for measuring the territorial sea in the direction of the high sea. The waters included within the group shall constitute inland waters."
>
> He explained, however, that he had inserted this text "not as expressing the law at present in force, but as a basis of discussion should the Commission wish to study a text envisaging the progressive development of international law on this subject." He referred to a passage in

C. SHELL KEYS TO POINT AU FER: ATCHAFALAYA BAY

There are four matters in controversy at this segment: (1) the location of the closing line of Atchafalaya Bay, (2) certain low-tide elevations within three miles of Point au Fer, (3) the status of other low-tide elevations outside Atchafalaya Bay, and (4) a dredged channel.

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the Judgment of the International Court of Justice in the Fisheries case where the Court had said (*I.C.J. Reports 1951*, p. 131):

"In this connection, the practice of States does not justify the formulation of any general rule of law. The attempts that have been made to subject groups of islands or coastal archipelagoes to conditions analogous to the limitations concerning bays (distance between the islands not exceeding twice the breadth of the territorial waters, or ten or twelve sea miles), have not got beyond the stage of proposals."

In his second report (A/CN.4/61) the special rapporteur suggested as article 10 an abbreviated version of his earlier proposal, which now simply read as follows:

"With regard to a group of islands (archipelago) and islands situated along the coast, the ten mile line shall be adopted as the base line."

After consulting the Committee of Experts the special rapporteur put forward a more elaborate proposal (see article 10 in A/CN.4/61/Add. 1) and yet a further proposal in his third report (see article 12 in A/CN.4/77).

The latter proposal read as follows:

"1. The term 'group of islands', in the juridical sense, shall be deemed to mean three or more islands enclosing a portion of the sea when joined by straight lines not exceeding five miles in length, except that one such line may extend to a maximum of ten miles.

"2. The straight lines specified in the preceding paragraph shall be the base lines for measuring the territorial sea; waters lying within the area bounded by such base

1. The closing line

We submit that the main closing line of Atchafalaya Bay runs from the extremity of South Point, on Marsh Island, to the extremity of Point au Fer. The line is 141,834 feet long, or 23.3272 miles.

Louisiana draws a line beginning about 5000 feet seaward of the federal line in the northwest and ending about 3000 feet seaward in the southeast. The southeastern terminus is on a low-tide elevation about 6000 feet seaward of Point au Fer.

The Louisiana line is impermissible for two reasons.

First, Louisiana's theory produces closing lines more than 24 miles in length. The straight line from Marsh Island to the low-tide elevation 6000 feet seaward of Point au Fer does not close Atchafalaya Bay, although it itself is 143,246.5 feet long. There remains

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lines and the islands themselves shall be considered as inland waters.

"3. A group of islands may likewise be formed by a string of islands taken together with a portion of the mainland coastline. The rules set forth in paragraphs 1 and 2 of this article shall apply *pari passu*."

The Commission, however, after postponing the question in 1954, decided in 1955 that article 5, which dealt with "Straight baselines", might be applicable to groups of islands situated off the coasts, while the general rules would normally apply to other islands forming a group. This position was confirmed in 1956, the Commission adding that it was prevented from stating an opinion on this subject not only by disagreement on the breadth of the territorial sea but also by lack of technical information. The Commission hoped, however, that if an international conference were subsequently to study the proposed rules, it would give attention to this problem which the Commission recognized to be an important one.

See *United States* v. *California*, 381 U.S. 139, 170, fn. 38.

the sizeable stretch of open water between this elevation and Point au Fer. Thus, when Louisiana speaks of a line from Point au Fer to the low-tide elevation "along the extension of the land form from Point au Fer" (paragraph (gg), La. Resp. and Opp. 84), the line it describes actually includes two segments across open water to or between low-tide elevations. See figure 3, p. 68, *infra*. One, from Point au Fer to the point x=1,990,280, y=241,863, is 3140.7 feet long. The other, from x=1,989,740, y=241,417, to x=1,989,300, y=241,522, is 452.4 feet long. These lines are needed to close the entrance. When added to the 143,246.5 feet of Louisiana's main crossing, these segments make a total of 146,839.6 feet, which exceeds by 914.8 feet the permissible total of 24 miles (145,924.8 feet), even without the additional closure at Southwest Pass.

Second, the Louisiana line is impermissible because a low-tide elevation[29] is not an acceptable headland for a bay. In discussing the segment of the coast from Tigre Point to Shell Keys, we demonstrated that a bay cannot be formed by drawing lines from the mainland out to an island. See pp. 60–66, *supra*. *A fortiori* a bay cannot be formed or extended out to sea by use of low-tide elevations surrounded by water, instead of mainland headlands. The suggestion that since closing lines are to be drawn to the low-water line, they may be drawn to low-tide elevations (La. Resp. and Opp.

[29] In using the term low-tide elevation, we follow the definition of the Convention (Art. 11(1), 15 U.S.T. (Pt. 2) 1610):

> A low-tide elevation is a naturally-formed area of land which is surrounded by and above water at low-tide but submerged at high tide.

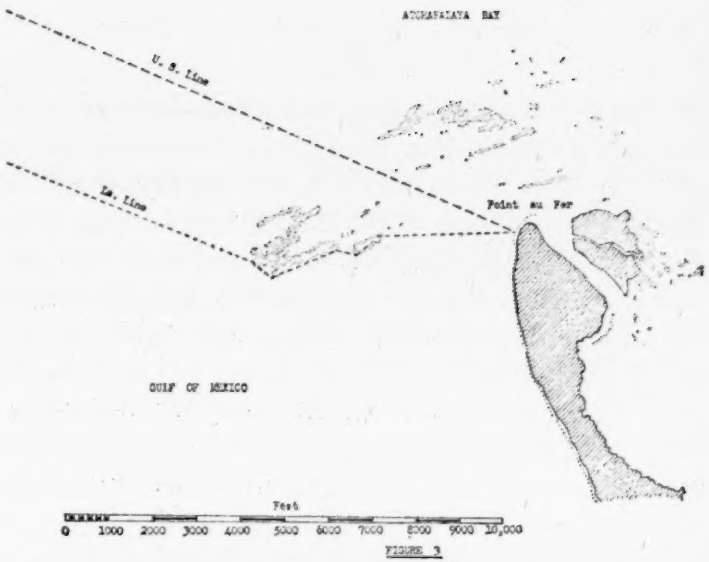

FIGURE 3

31) is unsound. It is one thing to say that in drawing a line to land, it shall be drawn to a point on the foreshore. It is quite another thing to say that lines may be drawn to elevations of the sea bed which are separated from the land even at low tide, and which at high tide are entirely submerged. The Convention makes specific and very limited provisions as to what use may be made of low-tide elevations. It permits the territorial sea to be measured from the *low-water line* on a low-tide elevation within three miles of the mainland or an island, but forbids their use as termini of closing lines even for the liberal straight-baseline procedure of Article 4, except where there are structures permanently above sea level. Obviously, it does not con-

template their use in the much stricter procedure of delimiting bays under Article 7.[30]

2. Low-tide elevations west of Point au Fer

Just west and south of Point au Fer lies a cluster of low-tide elevations, within three miles of the mainland, two points on which have been described by the United States as controlling the three-mile line in that vicinity. U.S. Mot. 18, paragraph (k). This is in accordance with Article 11 of the Convention on the Territorial Sea and the Contiguous Zone, which provides that the breadth of the territorial sea may be measured from low-tide elevations situated within three miles[31] of the mainland or an island. 15 U.S.T. (Pt. 2) 1610. *Infra*, p. 71.

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[30] Bay closing lines are established by the application of general rules, and need not be published by the coastal nation. Straight baselines, on the other hand, represent a policy decision by the coastal nation, within the limits of the Convention, and must be published to be recognized. Article 4, 15 U.S.T. (Pt. 2) 1608. World wide, cartographic information regarding low-tide elevations is by no means complete or accurate; it would be intolerable to expect foreign nations to respect "bays" consisting of a series of imaginary lines between low-tide elevations of whose existence they were never notified and might have no means of learning. The special charts made for purposes of the present case represent an unusually detailed and accurate survey of low-tide lines, and are by no means typical of what is generally available.

[31] As explained below (pp. 71–76, *infra*), the Convention refers to low-tide elevations situated "at a distance not exceeding the breadth of the territorial sea" from the mainland or an island, leaving the signatories free to make whatever claims each has about the breadth of the territorial sea. To avoid repeated use of that cumbersome phrase in our present discussion, we substitute "three miles," the actual amount of the specified distance as established in American practice.

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Louisiana, on the other hand, has described a continuous line running from Point au Fer to and between these low-tide elevations, and, in order to maintain the continuity of the line, has included three points on low-tide elevations that we have omitted. It is the outermost of the low-tide elevations that Louisiana seeks to use as a headland in drawing her closing line across Atchafalaya Bay.

We have already pointed out the impermissibility of that use of low-tide elevations. See pp. 67–69, *supra*. Once our point is accepted, the drawing of the continuous line to and between low-tide elevations loses its practical significance for this particular instance because neither the three additional points specified by Louisiana nor the connecting lines have any effect on the three-mile lines as measured from the points specified by the United States. But the use of lines to offlying low-tide elevations is wrong in principle and would be harmful as a precedent.[32]

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[32] Under the Convention low-tide elevations may be used as base points for measuring the three-mile arc of the territorial sea when located within three miles of the mainland or an island. Article 11. They may be used in drawing straight baselines if permanent structures are built on them, but not otherwise. Article 4, par. 3, 15 U.S.T. (Pt. 2) 1608. No other use is authorized. Here Louisiana is purporting to describe a line delimiting an extension of the land mass of Point au Fer. La. Resp. and Opp. 53–54; 84: While that would be quite proper if there were a continuous beach, exposed at low tide, extending out from Point au Fer, there is no justification for it here. As Figure 3, *supra*, p. 68, shows, it is about 2500 feet from Point au Fer to the nearest of the low-tide elevations; it is 3140.7 feet to the first point used by Louisiana. Plainly, these elevations are not part of the mainland, but are low-tide elevations "surrounded by and above water at low-tide but

3. Low-tide elevations outside Atchafalaya Bay

Outside the mouth of Atchafalaya Bay there are several low-tide elevations that are within three miles of the closing line of the bay, as drawn by either party, but that are more than three miles from the low-water line on the mainland or any island. Louisiana asserts (La. Resp. and Opp. 54–56) and the United States denies that such low-tide elevations are a proper part of the baseline from which to measure the three-mile limit of the submerged lands given to Louisiana by the Submerged Lands Act.

The question depends on the meaning on Article 11 of the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. (Pt. 2) 1610, which provides:

Article 11

> 1. A low-tide elevation is a naturally-formed area of land which is surrounded by and above water at low-tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.
>
> 2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the

submerged at high tide" as defined by Article 11 of the Convention. Consequently, the three-mile line may be measured from them, since they are within three miles of the mainland, but closing lines may not be drawn to or between them to form a continuous coast line. Louisiana's attempt to use them in that way is a departure from the clear rules of the Convention.

> territorial sea from the mainland or an island, it has no territorial sea of its own.

Carefully read, this provision does not sanction the use of low-tide elevations "within the territorial sea." It does not refer to the territorial sea as a situs. It uses the width of the territorial sea only as a measure of distance—a circumlocution made necessary by the Conference's failure to reach any international agreement on what that width should be. It permits low-tide elevations to be used as part of the baseline only when located within that distance "from the mainland or an island," but not when located merely within that distance from inland waters.

Such is the plain meaning of the words. The history of Article 11 shows that the distinction was made deliberately. The corresponding provision in the first projet for the Convention, as submitted to the International Law Commission by J. P. A. François, special rapporteur, appeared in the fourth paragraph of Article 5 which defined the baseline of the territorial sea (U.N. Doc. A/CN.4/53, 4 April 1952, p. 22):

> 4. Elevations of the sea bed situated within the territorial sea, though only above water at low tide, are taken into consideration for the determination of the base line of the territorial sea.[33]

That provision was repeatedly revised by the rapporteur and discussed by the Commission during the next four years. In 1954, it was made a separate Article, numbered 13 in the rapporteur's draft of that

[33] For the original French text, see 2 *Yearbook of the International Law Commission* (1952) 32–33.

year (U.N. Doc. A/CN.4/77, 4 February 1954, p. 13; French text, 2 *Yearbook of the International Law Commission* (1954) 5) and renumbered 12 as adopted by the Commission subject to redrafting (1 *Yearbook of the International Law Commission* (1954) 98; 2 *id.* 156). It was renumbered 11 in 1955, 1 *Yearbook of the International Law Commission* (1955) 252; 2 *id.* 38; and as finally adopted by the Commission in 1956 it read (2 *Yearbook of the International Law Commission* (1956) 270):

Article 11

> Drying rocks and drying shoals which are wholly or partly within the territorial sea, as measured from the mainland or an island, may be taken as points of departure for measuring the extension of the territorial sea.

The principal problem treated in the intervening discussions was how to avoid the circularity of providing that the territorial sea should be measured from low-tide elevations within the territorial sea and make it clear that the provision would not apply to a low-tide elevation that was within the territorial sea only as extended by measurement from another low-tide elevation. Successive drafts of the provision and relevant portions of the discussions are set out in Appendix B.[34]

On April 1, 1958, prior to the United Nations Conference on the Law of the Sea, the United States

[34] A more summary review of the development of this Article by the International Law Commission will be found in the *Reference Guide to the Articles Concerning the Law of the Sea Adopted by the International Law Commission at Its Eighth Session* (U.N. Doc. A/C.6/L.378) 48–49.

proposed that Article 11 be amended as follows (*U.N. Conference on the Law of the Sea, Official Records*, vol. 3, First Committee (Territorial Sea and Contiguous Zone), Summary Records of Meetings and Annexes, A.CONF.13/39, p. 243):

"*Low-Tide Elevations*

"A low-tide elevation is a naturally-formed area of land which is surrounded by and above water at low-tide but submerged at high-tide. The low-tide line on a low-tide elevation which is within T-miles of a mainland or an island may be used as a baseline (T being the breadth of the territorial sea)."

That proposal was adopted (*id.* 187), and the Article was then revised by the drafting committee to read (*id.* 256):

"*Low-Tide Elevations*

"1. A low-tide elevation is a naturally-formed area of land which is surrounded by and above water at low-tide but submerged at high tide. Where a low-tide elevation is wholly or partly at a distance, from the mainland or an island, not exceeding the breadth of the territorial sea, the low-water line on that elevation may be used as the baseline for measuring the territorial sea.

"2. Where a low-tide elevation is situated wholly at a distance, from the mainland or an island, exceeding the breadth of the territorial sea, it has no territorial sea of its own."

The provision was adopted in that form by the First Committee (*id.* 259), and so included in its Report. *U.N. Conference on the Law of the Sea,*

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Official Records, vol. 2, Plenary Meetings, Summary Records of Meetings and Annexes, A/CONF.13/38, 115, 124. Apparently to meet a suggestion made by the First Committee in submitting its report, the Drafting Committee of the Conference made a verbal transposition. In place of the First Committee's phrase in paragraph 1, "is wholly or partly at a distance, from the mainland or an island, not exceeding the breadth of the territorial sea," the drafting committee substituted "is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island," with a corresponding transposition in paragraph 2. *Id.* 130–131. That is the form in which the Article was finally adopted, *id.* 64.

It is evident that the significant change in the wording of this Article occurred with adoption of the American proposal, substituting a measure of *distance* from the mainland or an island for the former reference to the territorial sea as a *situs.* The subsequent revisions by the drafting committees adhered to that approach, and were made only for smoother literary effect. However, the end result bears a superficial resemblance to the International Law Commission's version, and may be to that extent misleading. The rather cumbersome phrase, "a distance not exceeding the breadth of the territorial sea," was made necessary by the failure of the Conference to agree what that distance should be. In the United States, we know that it is three miles, and for our purposes, a clearer understanding of the meaning of the Article can be gained by making that substitution:

> 1. * * * Where a low-tide elevation is situated wholly or partly at a distance not exceeding *three miles* from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.
>
> 2. Where a low-tide elevation is wholly situated at a distance exceeding *three miles* from the mainland or an island, it has no territorial sea of its own.

Thus, the effect of Article 11 is to divide low-tide elevations within the territorial sea into two categories. The first, within three miles of the mainland or an island, may be used as part of the baseline of the territorial sea; the second, more than three miles from the mainland or an island, cannot. No doubt the principal purpose of this approach was to prevent "leapfrogging"—the use of an extension produced by one low-tide elevation to justify the use of another elevation not otherwise qualified. See Appendix B, *infra*. But the Conference clearly recognized that there were other situations in which the use of low tide elevations in the territorial sea would be barred.

This is apparent from the discussions concerning Article 9 of the Convention. That Article provides that the territorial sea may include roadsteads normally used for the loading, unloading and anchoring of ships, which otherwise would be outside the territorial sea. 15 U.S.T. (Pt. 2) 1609. In the First Committee of the Conference, Mr. Verzijl, representing The Netherlands, proposed an amendment to make clear that this would take in intervening water between the roadstead and the normal territorial sea,

and also to add this sentence at the end of the Article (*U.N. Conference on the Law of the Sea, Official Records,* vol. 3, First Committee (Territorial Sea and Contiguous Zone), Summary Records of Meetings and Annexes, A/CONF.13/39, p. 230):

> "This provision shall not be invoked, however, to justify further extensions of the territorial sea from drying rocks or drying shoals comprised within the territorial sea only by the operation of the preceding sentence."

The Netherlands proposal was rejected as superfluous (*id.* 143–144), as the later debates on Article 11 made clear (*id.* 186–187):

> 4. Mr. FRANCOIS (Expert to the secretariat of the Conference) said that all the proposals on article 11 correspond entirely to the intentions of the International Law Commission. With regard to the Netherlands proposal, he pointed out that the words "as measured from the mainland or an island" in the International Law Commission's draft covered the contingency envisaged by the Netherlands representative.

In reliance on that assurance, Mr. Verzijl withdrew his proposal (*ibid.*).

Thus, it was clearly understood that Article 11 would prevent use of *all* low-tide elevations that were more than three miles from the mainland or an island, not merely those that were in a part of the territorial sea that was derived from use of another low-tide elevation.

The question is thus reduced to whether the closing line of a bay can be "mainland" or "island" as those

words are used in Article 11. Plainly, in the case of a bay in an island, the closing line is not part of the island. Article 10 of the Convention defines an island as "a naturally-formed area of land, surrounded by water, which is above water at high-tide." 15 U.S.T. (Pt. 2) 1609. The closing line of a bay is not an "area of land"; it is a legal abstraction, not something "naturally formed"; and it is not above water at high tide.[35]

The convention does not define "mainland," but that is hardly necessary. *Webster's Third International Dictionary* (1961), p. 1362, defines it as "a continuous body of land constituting the chief part of a country or continent." The *Oxford Universal Dictionary* (3d ed., rev. 1955), p. 1189, defines it as "A continuous body of land; dist. from *islands* or *peninsula*. †Formerly occas.=land as opp. to sea, *terra firma*. * * *" 6 *Century Dictionary* (1911), p. 3583, defines it as "The continent; the principal land, as distinguished from *islands*." As an example, it quotes A. E. Freeman, *Venice*, p. 124, "They landed on the *mainland* north of the haven." *Words: The New Dictionary* (1947), p. 361, defines it as "The continent; largest area of land adjacent to water." [36]

Certainly dictionary definitions are not the alpha and omega of legal interpretation; but neither can

[35] Article 7 requires closing lines to be drawn between points on the *low*-water line. 15 U.S.T. (Pt. 2) 1610.

[36] The corresponding word in the French text of the Convention is "continent" (15 U.S.T. (Pt. 2) 1618), defined by the *Petit Larousse* (1967), p. 248, as "Vaste étendue de terre qu'on peut parcourir sans traverser la mer" (vast expanse of land that one may travel over without crossing the sea).

they be ignored in any attempt to determine the meaning of a statute or treaty. The foregoing definitions are exactly in keeping with what we believe to be the general understanding of the word "mainland," and they afford no justification for extending it to the closing line across the entrance of a bay. Such a line is not a "continuous body of land"; on the contrary, it marks a discontinuity in the land. It is not "land as opposed to sea." It is not *"terra firma."* A bay is not an "area of land adjacent to water"; on the contrary, it is an area of water adjacent to land. Few people indeed, finding themselves in mid-entrance of a 24-mile bay, 12 miles from the nearest land, would describe their situation as "on the mainland."[37]

We need not look merely to the understanding of English-speaking people generally. The present reference to "mainland" in Article 11 derives from the proposal made by the United States on April 1, 1958 (*supra,* p. 73). Three days earlier, on March 29, 1958, the United States had proposed an amendment to Article 4, by which it would have introduced the word "mainland" in the title of that Article for the express purpose of indicating that water crossings were *excluded* from its scope. At that time, the draft

[37] *Cf. State* v. *Barco*, 150 N.C. 792, 63 S.E. 673 (1909), holding that c. 376 of North Carolina Laws of 1907 (§ 3474 of Pell's Revisal of 1908 of North Carolina), requiring boats to anchor "not more than three hundred yards from the mainland on the west side of Currituck Sound" was violated by anchorage within 300 yards of an island separated from the mainland by a channel. The whole of the sound is inland waters, and would be part of the "mainland" under Louisiana's view.

of Article 4 (now Article 3) was as follows (*U.N. Conference on the Law of the Sea, Official Records,* vol. 3, First Committee (Territorial Sea and Contiguous Zone), Summary Records of Meetings and Annexes, A/CONF.13/39, p. 209):

Normal Baseline

Article 4

Subject to the provisions of article 5 and to the provisions regarding bays and islands, the breadth of the territorial sea is measured from the low-water line along the coast, as marked on large-scale charts officially recognized by the coastal State.

The United States proposal was as follows (*id.*, 236; A/CONF.13/C.1/L.87):

Article 4

Amend the heading and text of the article to read as follows:

"*Mainland baseline*

"*Article 4*

"Subject to the provisions of the present rules, the baseline is the low-tide line on the mainland. The baseline shall be marked on large-scale charts officially recognized by the coastal State."

Comments

The above amendment is proposed for the following reasons:

(*a*) The use of the adjective "normal" in the International Law Commission's heading for draft article 4 is unjustified since water-crossing baselines approved in articles 5, 7 and 13 are just as "normal" under the geographic conditions described therein.

(*b*) The title "mainland baseline" is suggested because this is the proper scope of the article. Baselines on islands and drying rocks and shoals are covered in articles 10 and 11.

(*c*) The first clause in the text of the International Law Commission is designed to except all types of water crossing baselines sanctioned elsewhere in the articles, but it fails to except those permitted in articles 7 and 13.

* * * * *

Thus, on March 29 the United States explained at some length that it considered "Mainland baseline" to be the best caption to indicate that Article 4 did not include water crossings or island baselines. It can hardly be supposed that three days later, on April 1, when the United States proposed use of the same word to describe the baseline from which to measure to permissible low-tide elevations, it had the undisclosed intention of including within it the very element of water crossings that it had declared the word to exclude on March 29. Certainly, the Conference could not have gained this understanding.[38]

[38] As indicative of the sense in which "mainland" was understood by those engaged in the formulation of this Convention, see the commentary of the International Law Commission to Article 7: "* * * the Commission's intention was to indicate that the presence of islands at the mouth of an indentation tends to link it more closely to the mainland * * *." *Report*

The history of Article 11 in the proceedings of the International Law Commission contains other indications that it was not intended to permit measurement from low-tide elevations merely because they were within three miles (or other width of the territorial sea) from the closing line of a bay. At the meeting of July 2, 1954, with reference to a draft of Article 13 that provided for use of drying rocks and shoals "within the territorial sea" (see Appendix B, *infra*), the following statement was made (1 *Yearbook of the International Law Commission* (1954) 96):

> 77. Mr. PAL quoted from the International Court's decision in the Fisheries case. The Court had referred to the contentions of the United Kingdom Government which had claimed that, in order to be taken into account, a drying rock should be situated within four miles of permanently dry land. The Court had not had to consider that in fact none of the drying rocks used by Norway as base points was more than four miles from the coast. [Footnote omitted.] For the Commission, however, the question of a maximum permissible distance of the drying rocks from the coast would be a relevant and pertinent one. If drying rocks, irrespective of their distance from the coast, were going to be given a territorial sea of their own, that would be tantamount to

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of the International Law Commission Covering the Work of Its Eighth Session, General Assembly, Official Records, Eleventh Session, Supplement No. 9 (A/3159) 15; 2 *Yearbook of the International Law Commission* (1956) 269. Thus, the Commission regarded a bay as something separate from the mainland, linked to it but not part of it.

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raising them to the status of islands; he could see no justification for such a course.[39]

[39]In the *Fisheries Case* (*United Kingdom* v. *Norway*), I.C.J. Reports (1951) 116, 128, the court said:

> The Parties also agree that in the case of a low-tide elevation (drying rock) the outer edge at low water of this low-tide elevation may be taken into account as a base-point for calculating the breadth of the territorial sea. The Conclusions of the United Kingdom Government add a condition which is not admitted by Norway, namely, that, in order to be taken into account, a drying rock must be situated within 4 miles of permanently dry land. However, the Court does not consider it necessary to deal with this question, inasmuch as Norway has succeeded in proving, after both Parties had given their interpretation of the charts, that in fact none of the drying rocks used by her as base points is more than 4 miles from permanently dry land.

The British contention in that respect was explained in the Memorial of the United Kingdom, filed January 27, 1950, reprinted in *Fisheries Case; Pleadings, Oral Arguments, Documents*, vol. 1, pp. 75–76:

> 104. * * * A bank or rock exposed only at low tide (low-tide elevation) is significant in regard to territorial waters only if it lies within a belt of territorial sea measured from the low-water mark of land permanently exposed * * *.
>
> 105. These rules, so far from being arbitrary, are founded on the practical consideration that claims to territorial waters are only admissible in respect of land permanently visible to mariners. The objection to measuring the territorial sea from elevations that are not permanently visible applies also to some extent in regard to low-tide elevations lying within the territorial sea of land which is permanently exposed. It was for this reason that in 1930 the Government of the United Kingdom preferred that only land permanently exposed should be taken into account. But the practical objection is not so strong in the case of low-tide elevations close to permanently visible land because other land-marks will normally be available to mariners enabling them to fix their position. * * *

In that connection, Mr. Lauterpacht proposed, at the next meeting on July 5, 1954, that the words "situated wholly or partly within the territorial sea" should be replaced by "if within the territorial sea as measured from the mainland or from an island." However, the proposal was not adopted, the discussion indicating that it did not differ from what was already intended. 1 *Yearbook of the International Law Commission* (1954), 96–98.

Thereafter, on February 1, 1955, the United Kingdom made a different proposal (2 *Yearbook of the International Law Commission* (1955) 58):

> *Article 12. Drying rocks and shoals*
>
> Her Majesty's Government approve this article subject to the insertion, after the words "territorial sea" in line 2, of "as measured from the low-water mark or from a base line" and the insertion, for the word "de-limiting", of the words "further extending". This amendment is intended to ensure that drying shoals are used only once to extend territorial waters and not in series with each extension bringing further rocks into range as points of departure for further extension.

There was no discussion of that British proposal, and it was not adopted. Taken together, these episodes show three things: (a) the logic of using low-tide elevations near visible land while rejecting those that are only near invisible closing lines across water, (b) a realization that closing lines should be separately mentioned if intended to be included, and (c) a failure to adopt the proposal to mention them. We can

only conclude, in the light of all this, that when the Conference adopted a provision for using low-tide elevations within the stated distance from the mainland or an island, and took no action on a proposal to permit use of low-tide elevations within that distance from closing lines of inland waters, it did not intend to permit measurement from such closing lines. It would indeed be anomalous to suppose that the undefined term "mainland" somehow permits measurement from the closing lines of bays in the mainland, when the defined term "island" so clearly precludes measurement from the closing lines of bays in islands.

If "mainland" were construed as including the closing lines of bays, it would be very difficult to find any basis for making a distinction as to straight baselines drawn under Article 4 of the Convention. However, low-tide elevations within three miles of such lines may be very far indeed from any visible land. There is no specific limit on the permissible length of straight baselines; those approved in the *Fisheries Case* ranged up to 44 miles in length and were many miles from the nearest part of the mainland.[40]

Often straight baselines and lines marking the outer limit of the inland waters of bays run between islands and the mainland. The closing line of Atchafalaya Bay is itself an example of this, running from

[40] See dissenting opinion of Sir Arnold McNair, I.C.J. Reports (1951) at 166–168, and *Fisheries Case: Pleadings, Oral Arguments, Documents*, unnumbered portfolio volume of maps. It appears from Maps VIII and IX that there are places on the line between Points 45 and 46 that are as much as 40 miles from the nearest part of the mainland, or 20 miles from the nearest island.

Point au Fer, on the mainland, to South Point, on Marsh Island. (A line across Southwest Pass, at the western extremity of Marsh Island, completes the 24-mile closure of the combined indentation of Vermilion, East and West Cote Blanche, and Atchafalaya Bays.) Should such a line be considered "mainland" or "island"? If the closure of a bay in the mainland is to be considered "mainland," then Marsh Island, an essential part of that closure, must also be "mainland." Yet "mainland" and "island" are antithetical. For example, the *Random House Dictionary of the English Language* (1966, unabridged) 865, defines "mainland" as "The principal land of a country, region, etc., as distinguished from adjacent islands." The same contrast is drawn in other definitions quoted above (*supra,* p. 78). It seems clear that lines marking the seaward limits of inland waters are a third category of baselines, neither mainland nor islands, and that Article 11 does not authorize measurement of the territorial sea from low-tide elevations within three miles of such lines.

The supplemental decree entered in *United States* v. *California,* 382 U.S. 448, 449, included the following:

> 2. As used herein, "coast line" means—
>
> > (a) The line of mean lower low water on the mainland, on islands, and on low-tide elevations lying wholly or partly within three geographical miles from the line of mean lower low water on the mainland or on an island; * * *.

That provision was included in identical form in the decrees there proposed by the United States (p. 2) and by California (p. 2). It was never the subject of

disagreement, and no argument was presented to the Court regarding it, beyond quotation of the relevant portion of Article 11 of the Convention at page 12 of the United States' memorandum in support of its proposed decree. We believe that it represents a correct interpretation of Article 11, and that it should be followed here (with appropriate reference to "mean low water" rather than "mean lower low water," because of the different character of the tides in the Gulf of Mexico).

4. The dredged channel at Atchafalaya Bay

In discussing the segment of the line from Sabine Pass to Tigre Point, we have already demonstrated that a dredged channel cannot be used as part of the baseline because it is not a harbor work within the meaning of Article 8 of the Convention and has no low-water line as required by Article 3. The same reasoning is applicable to the channel at Atchafalaya Bay.

D. POINT AU FER TO OYSTER BAYOU

There is no dispute about the line from Point au Fer southeastward to a location between Oyster Bayou and East Bay Junop, at x=2,076,201, y=189,799. U.S. Mot. 18–19, paragraphs (l), (m), and (n); La. Resp. and Opp. 82–84, paragraphs (dd), (ee), and (ff).

E. OYSTER BAYOU TO RACCOON POINT: CAILLOU BAY

The dispute concerning this segment is over whether Caillou Bay qualifies as inland waters. Louisiana so asserts. She designates the point x=2,076,730, y=189,630 (about 530 feet east of our last concurrent point referred to above) as the northern natural entrance

point to Caillou Bay and draws a closing line from there to the westernmost extremity of the Isles Dernieres. La. Resp. and Opp. 82, paragraphs (bb) and (cc). We submit that the area called Caillou Bay is not a bay under the Convention despite its name, and therefore draw the line along the shore and across small entrances to inland waters, to the western tip of the Isles Dernieres, omitting segments too far recessed to affect the three-mile line.

Caillou Bay does not qualify under the Convention for two reasons. First, it is not a "well-marked indentation" in the land, as Article 7 requires. Omitting the Isles Dernieres because they are islands, the shore from Point au Fer to Caillou Boca is essentially straight. Fig. 4, opposite. In that stretch of 35 geographical miles, the mainland coast does not depart from a straight line by more than about 2½ miles. Second, Louisiana's argument is predicated on the mistaken assumption that islands may form a bay. She can construct a bay here only by bounding it on one side by the mainland and on the other by the westward extension of the Isles Dernieres, with closing lines across the openings between various of those islands. We have already shown that islands cannot form a bay within the meaning of the Convention.[41] See pp. 60–66, *supra*.

[41] Even if the Isles Dernieres were a peninsula instead of a chain of islands, Louisiana's northern headland for the resulting bay would be much too far west. A much more natural entrance point would be on the coastal bulge between Taylors Bayou and Grand Bayou du Large, almost due north from the tip of the Isles Dernieres. From there west, the mainland shore is not in any sense part of the enclosure of Caillou Bay.

F. RACCOON POINT TO WHISKEY ISLAND

Between Raccoon Point and Whiskey Island there are only three small problems in the lines proposed.

1. Our description includes one point on the north shore of the Isles Dernieres (x=2,117,632, y=143,583) that Louisiana omits because it lies within the closing line of Caillou Bay as erroneously drawn by Louisiana. U.S. Mot. 20, paragraph (s); La. Resp. and Opp. 82, paragraphs (bb) and (cc).

2. There is an inadvertent error in the decree proposed by the United States, which describes in this area a continuous line along the southern side of the Isles Dernieres and across the openings between successive islands. U.S. Mot. 21–22. Since Caillou Bay is not inland waters, there is no basis for drawing closing lines between the islands, and our description

should be amended by omitting those closing lines. Each of the islands should have its own three-mile belt, measured in each instance from the shore of the island as described in our proposed decree. Because the openings between the islands are not large, those three-mile belts meet to form one continuous belt, not greatly different from one measured from lines connecting the islands.

3. If Caillou Bay were inland waters, as Louisiana supposes, then it would be proper to draw closing lines across the entrances into the bay between the Isles Dernieres. However, we believe that at the small entrance just west of Whiskey Island, Louisiana has extended its closing line far eastward of the proper headland. The effect on the three-mile line is trivial, but Louisiana's choice, being wrong in principle, would have a damaging precedential effect. As appears from the smaller diagram of Figure 5, opposite, the appropriate eastern headland would be at the point x=2,163,266, y=135,182; the waters between that point and the point used by Louisiana, x=2,164,477, y=134,753, are not enclosed in any sense, but are exposed to the open Gulf.

G. WHISKEY ISLAND TO CAMINADA PASS

The United States and Louisiana agree that the complex area known by different names for different parts (such as Lake Pelto, Terrebonne Bay, and Timbalier Bay) is to be treated as a single body of inland waters. La. Resp. and Opp. 50. The differences relate to two issues: (1) whether the dredged channel into Terrebonne Bay is a harbor work and (2) the

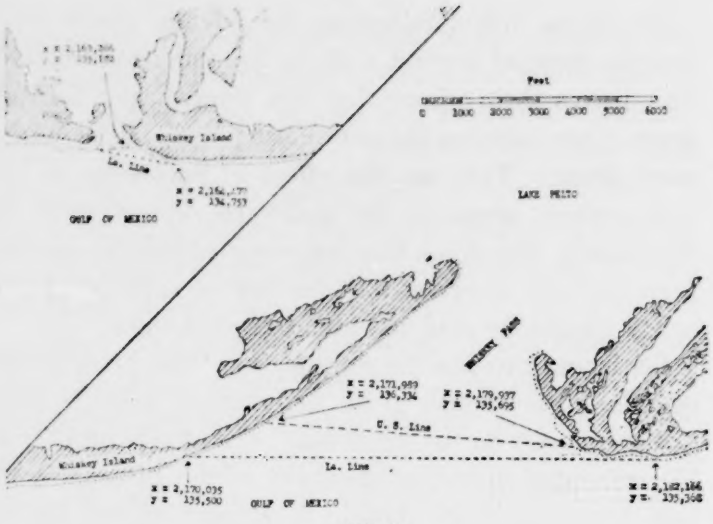

FIGURE 6

proper identification of the headlands and the method of drawing closing lines in relation to the islands in the mouth of the bay.

1. The dredged channel is not a "harbor work" within the Convention for the same reasons as the channels discussed at pp. 51–56, *supra.*

2. The mouth of this complex body of waters extends from the mainland north of Caillou Boca to a point just west of Bay Marchand. The mouth is crossed by a distinct group of long, narrow islands that form a smooth and almost unbroken barrier between the inner waters of the bay and the open waters of the Gulf. In our view, these islands form the geographical division between the bay and the Gulf, and the closing lines marking the outer limits of the inland waters of the bay should be drawn between successive islands of the chain.

Louisiana, while following the islands where they project seaward beyond a direct headland-to-headland line, leaves them where they dip inward, and instead draws lines between the outermost points of the outermost islands. This has the effect of enclosing, as inland waters, areas on the gulfward side of some of the islands. We think this improper where the islands form so tight a screen that the bay as a geographical entity cannot be said to extend beyond them.

Louisiana invokes the concept that "the presence of islands at the mouth of an indentation tends to link it more closely to the mainland" (La. Resp. and Opp. 50), as stated in the commentary of the International Law Commission to Article 7, *Report of the International Law Commission Covering the Work of Its Eighth Session: U.N. General Assembly Official Records: Eleventh Session, Supplement No. 9* (A/3159), p. 15, 2 *Yearbook of the International Law Commission* (1956) 269. However, that statement obviously refers to the waters landward of the islands; and the converse is equally true. To the same extent that the water landward of the islands is more shut in by their presence, the water seaward of the islands is more shut out. Islands occupying a relatively small part of the width of the entrance are usable to extend the total length of the closing line beyond 24 miles from mainland headland to mainland headland, provided the water crossings do not add up to more than 24 miles, but the islands need not be regarded as either extending or restricting the extent of the inland waters. However, where a chain of islands occupies a major part of the width of the mouth (here about 75%, in

our view), the only realistic way to delimit the inland waters is to recognize the islands as the dividing line, supplemented by crossings between successive islands.

The eastern shore of this indentation is rather irregular in outline, and is traversed by some small waterways, but it is plainly part of the mainland. It meets the open shore of the Gulf of Mexico at approximately a right angle, opposite the eastern end of East Timbalier Island. We regard this angle as its eastern headland. To the north and west, on the other hand, the indentation is bounded by a swampy area, intersected by innumerable small waterways, which might technically be considered a group of islands and as such not qualified to constitute the headland of a bay.[42] However, it exactly resembles in this respect the St. Bernard Peninsula, considered by the Court in *Louisiana* v. *Mississippi*, 202 U.S. 1, 45–46, which the Court concluded should be considered part of the mainland despite its many intersecting waterways. We think that what the Court said of that area is equally applicable here:

> Mississippi denies that the peninsula of St. Bernard and the Louisiana Marshes constitute a peninsula in the true sense of the word, but insists that they constitute an archipelago of islands. Certainly there are in the body of the Louisiana Marshes or St. Bernard peninsula portions of sea marsh which might technically be called islands, because they are land entirely surrounded by water, but they are not true islands. They are rather, as the commissioner of

[42] *Supra*, pp. 60–66.

> the General Land Office wrote the Mississippi land commissioner in 1904, "in fact, hummocks of land surrounded by the marsh and swamp in said townships. . . ."
>
> And when the Louisiana act used the words: "thence bounded by the said Gulf to the place of beginning, including all islands within three leagues of the coast," the coast referred to is the whole coast of the State, and the peninsula of St. Bernard formed an integral part of it.

The mainland, as thus defined, extends at least as far southward as the southern tip of the peninsula that extends southward between Caillou Bay and Pelican Lake, and no farther south than the definite break made by Caillou Boca. For present purposes, no more precise identification is necessary. Under technical rules applicable to islands crossed by lines between the mainland headlands of a bay, closing lines are then to be drawn out to Whiskey Island.[43]

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[43] A closing line from the above peninsula to the eastern headland intersects both East Timbalier Island and the island which forms the southern shore of Pelican Lake; consequently both islands become part of a tentative closing line, under Article 7 of the Convention. The natural entrance points between those islands, in turn, are the western tip of East Timbalier Island and the southern tip of the island south of Pelican Lake, and a tentative crossing line is drawn between them. The line between those points crosses Timbalier Island and the easternmost of the Isles Dernieres, which in turn thereby become part of the closing line. From the natural entrance point at the western end of the easternmost of the Isles Dernieres, a closing line to the southern tip of the island south of Pelican Lake crosses Whiskey Island, which is thus made the last link in the closing line. Between the mainland headlands and these successive islands, the closing lines are to be drawn between the natural entrance points of each entrance.

As appears from the coordinates, Louisiana's line across Whiskey Pass, east of Whiskey Island, is 834 feet seaward of the federal line.[44] Like the crossing west of Whiskey Island (p. 90, *supra*), Louisiana's line here encloses waters that are in no sense landlocked. Because this decree will be closely studied as a precedent in applying the same principles elsewhere, we consider it of the utmost importance that even small improprieties be scrupulously eliminated.

The major difference between the State and federal lines occurs in the next crossing eastward. Here, we follow the shore of the easternmost of the Isles Dernieres to its eastern extremity, where we make a crossing of 31,239.8 feet, or about 5.1 miles, to the western end of Timbalier Island,[45] then along the shore of Timbalier Island to its eastern end. Louisiana, on the other hand, would draw a direct line of 113,918.6 feet, or about 18.7 miles, from the southernmost point on the easternmost of the Isles Dernieres, near its western end, to the southernmost point on Timbalier Island, near its eastern end.

In our view, Louisiana's line encloses waters that cannot be considered "inland waters." About 73 percent of the line runs immediately gulfward of the island, while only about 27 percent of it is opposite the

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[44] This distance occurs at the western end of the federal line, which has a y coordinate of 136,334. U.S. Mot. 22. The western end of Louisiana's line has a y coordinate of 135,500. La. Resp. and Op. 81, paragraph (z). See Figure 5, *supra*, p. 91.

[45] Wine Island, about 4,000 feet inside this line, is too small to have any substantial screening effect, and we do not consider it appropriate to include it in the chain of boundary islands delimiting the inland waters of the bay.

entrance of the inner waters of Terrebonne Bay. On the gulfward side of the eastern of the Isles Dernieres, there lies between Louisiana's line and the island a triangle of water, about 6.5 miles wide from east to west, having its greatest penetration landward about 1.6 miles at the eastern end of the island. On the gulfward side of Timbalier Island, there lies between Louisiana's line and the island a triangle of water, about 6.7 miles wide from east to west, having its greatest penetration landward about 2.6 miles at the western end of the island. Both those areas are so exposed to the open Gulf and so completely shut off from the inner waters of Terrebonne Bay that their inclusion as inland waters is not justified.

It should be observed, also, that between Timbalier Island and the Isles Dernieres, Louisiana's line runs about 2,000 feet seaward of a direct line between the headlands of the whole indentation as recognized by Louisiana, or about three miles seaward of a direct line between the headlands of the indentation as recognized by the United States. The difference between the State and federal headland-to-headland lines results from the fact that Louisiana refers to Whiskey Island and the southern extremity of East Timbalier Island as the natural entrance points of the indentation (La. Resp. and Opp. 81), whereas the United States regards points on the mainland, north of Caillou Boca and west of the eastern end of East Timbalier Island, as the true headlands.[46] Our reasons

[46] Even our eastern headland may technically be on an island. It is the tip of a peninsula, the base of which is marshy and may perhaps be completely traversed by some small waterways.

for rejecting islands as headlands of a bay were discussed at pp. ——, *supra*. Thus, Louisiana's line, by following the islands outward while refusing to follow them inward, takes in a substantial area of water that is not only shut off from the bay by a close screen of islands, but is also seaward of a direct line between the mainland headlands of the bay. This area is not "enclosed" in any sense whatsoever, and plainly cannot be considered inland waters.

The same situation, though on a very much smaller scale, exists at Little Pass Timbalier, between Timbalier and East Timbalier Islands, as shown on Figure 6, p. 98, *infra*. It requires no separate comment.

From the point just west of Bay Marchand to the shore southwest of Caminada Pass the proposed lines are identical except for a dredged channel. As in other instances, the dredged channel may not be treated as a "harbour work."

H. CAMINADA PASS TO EMPIRE CANAL: "ASCENSION BAY"

The coast line proposed by the United States in this area follows the contour of the land with individual closing lines at Caminada Pass and the Empire Canal. The intervening entrances are so recessed that they do not affect the three-mile line; hence, they are not described in our proposed decree.

However, we think it is to be regarded in substance as part of the mainland, for the reasons discussed at pp. 93–94, *supra*, with regard to the western headland. On the other hand, East Timbalier Island, used as a headland by Louisiana, is a distinct geographical entity, separated from the mainland by a definite pass and, except at that single point, wholly isolated and remote from the mainland.

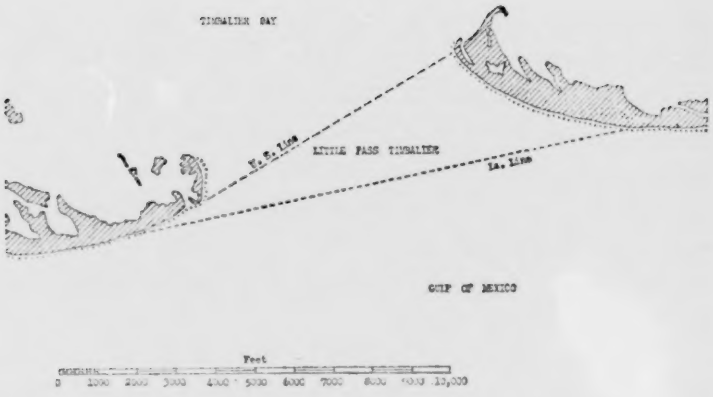

FIGURE 6

Louisiana's submission differs in two respects:

The first and major difference is that Louisiana would draw a 24-mile line from a point on the shore about a mile southwest of Caminada Pass to the tip of the eastern jetty at the Empire Canal. Her theory is that the entire area east of the Mississippi Delta is a true bay with the eastern headlands at the jetties at Southwest Pass and the western headland at Belle Pass jetties (near Bay Marchand). Louisiana calls the area "Ascension Bay" for the purpose of this litigation, but the term has no recognized usage. Since the distance between the claimed headlands is 42.783 miles, the entire bay cannot be inland waters under Article 7 of the Convention. Louisiana therefore claims the benefit of the special procedure in paragraph 5, providing that in bays exceeding 24 miles in width at the mouth, "a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that

is possible with a line of that length." 15 U.S.T. (Pt. 2) 1609.

The second and fall-back position of Louisiana is that the beach erosion jetties at Grand Isle are part of the coast.

1. "Ascension Bay"

Louisiana's 24-mile straight baseline in "Ascension Bay" is insupportable because "Ascension Bay" is not a true bay under Article 7 of the Convention. Paragraph 2 of Article 7 defines a bay:

> For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

"Ascension Bay" fails to satisfy this definition, first, because it is not a "well-marked indentation." The quoted words are the first and primary criterion for a bay. The semicircle test is a convenient mathematical limitation imposed even where the primary geographical criteria are satisfied; but aggregating connecting waters into a combination that satisfies the semicircle test is not alone enough to qualify the aggregation under Article 7.

This is clear not only from the wording of the quoted paragraph but from its history. The rapporteur for the Convention, in the drafts contained in his first and second reports to the International Law

Commission, did not define a bay. *Report on the Regime of the Territorial Sea,* U.N. Doc. A/CN.4/53 (Apr. 4, 1952) 25–27; *Second Report on the Regime of the Territorial Sea,* U.N. Doc. A/CN.4/61 (Feb. 19, 1953) 34–36. In an addendum to his second report, and again in his third report, the rapporteur introduced the semicircle test as the definition of a bay. U.N. Doc. A/CN.4/61/Add. 1 (May 18, 1955 6); U.N. Doc. A/CN.4/77 (Feb. 4, 1954) 10. However, following discussion by the Commission in 1955, this approach was rejected and the present geographical definition was adopted, with the semicircle test relegated to the status of a minimal limit. 1 *Yearbook of the International Law Commission* (1955) 206–207, 210–211.

In the debates of the First Committee, when it considered this Article at the 1958 Conference, it was clearly recognized that the basic element of the definition of a bay was that it must be a "well-marked indentation." Regarding a proposal to refer to the drafting committee certain amendments suggested by the United Kingdom, the following occurred:

> 32. Mr. Ba Han (Burma) said that questions of drafting were inextricably bound up with substance in the United Kingdom amendments. For example, the International Law Commission's test defined a bay as a "well-marked indentation"; whereas the United Kingdom text spoke simply of an "indentation". But surely not every indentation was a bay. [*U.N. Conference on the Law of the Sea, Official Records,* vol. 3: First Committee (Territorial Sea and

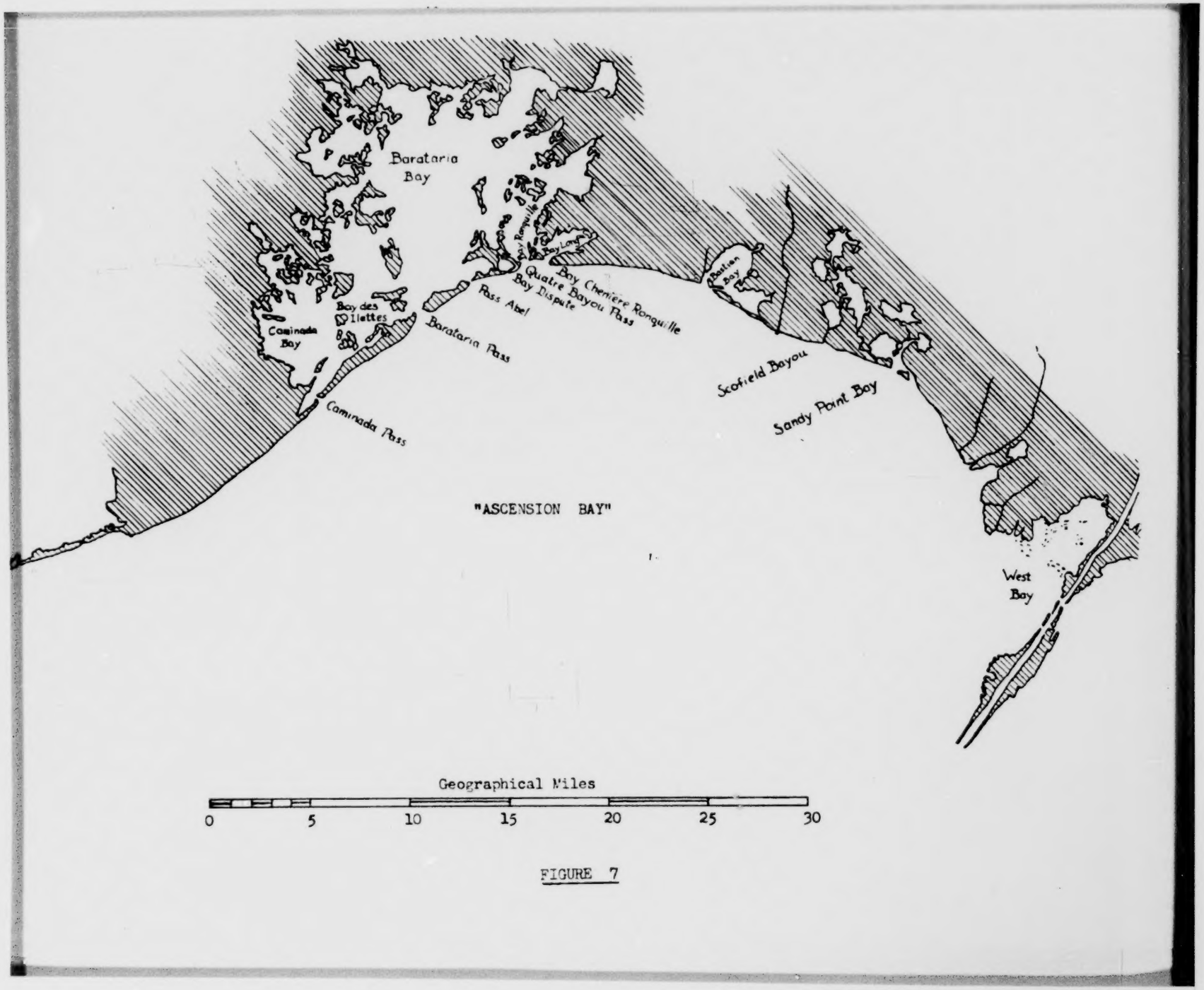
Barataria Bay
Bay Ronquille
Bay Cheniere Ronquille
Quatre Bayou Pass
Bay Dispute
Pass Abel
Bay des Illettes
Caminada Bay
Barataria Pass
Caminada Pass
Bastian Bay
Scofield Bayou
Sandy Point Bay
West Bay
"ASCENSION BAY"
Geographical Miles
0
5
10
15
20
25
30

FIGURE 7

Contiguous Zone), Summary Records of Meetings and Annexes (A/CONF. 13/39) p. 146.]

Primarily, then, a bay is "a well-marked indentation." Webster's Third International Dictionary (1967) 1383, defines "marked," as used in the phrase "well marked," as "having a distinctive or strongly pronounced character." The area that Lousiana calls "Ascension Bay," shown in Figure 7, opposite, well illustrates how the inner waters do but the outer waters do not meet this definition. Proceeding from land to sea, as one logically should in determining how far the inland waters extend, we look first at the highly broken area to the northwest, designated in various parts as Caminada Bay, Bay des Ilettes, Barataria Bay, Bay Ronquille, Bay Cheniere Ronquille, Bay Long, and by various other names not shown on Figure 7. Geographically, this whole area might well be considered a single bay. Although it contains many islands that tend somewhat to subdivide it, the configuration is haphazard, and lines of subdivision could be drawn in various ways with equal justification. As a whole, it is certainly a well-marked indentation. The southwestern headland is at Caminada Pass, the northeastern headland at Bay Cheniere Ronquille. At both points the shore turns in sharply, virtually doubling back on itself. In broad outline, both shores then proceed northward. Along the Gulf between those two points stretches a smooth shore, broken only by six narrow openings: Caminada Pass (2152 feet), Barataria Pass (3155.49 feet), Pass Abel (1029.4 feet), Bay Dispute (about 300 feet), Quatre Bayou Pass (4588.2 feet), and Bay Cheniere Ronquille, leading to

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Bay Long (1185.48 feet). It can hardly be denied that those entrances give access to "a well-marked indentation."

But outside, the situation is entirely different. A person on the gulfward side of the island screen would never consider himself to be looking out at a "well-marked indentation." The long, smooth shore of the Gulf, stretching to the southwest on one side and to the east on the other, does not at all partake of the "distinctive or strongly pronounced character" of the inner bays.

The same contrast emphasizes the failure of the outer portion of the area Louisiana calls "Ascension Bay" to meet a second requirement of Article 7, paragraph 2: the bay must be made up of "landlocked waters." Caminada Bay, Barataria Bay, and Bastian Bay to the east can fairly be described as "landlocked" but no one coming out through any of the passes into the Gulf from any of those areas would say that he was still in "landlocked" waters.

The width of the entrance to "Ascension Bay" is 42.783 miles, more than 75 percent greater than the permissible 24-mile width of inland waters. While the 24-mile limitation is not part of the definition of a bay, as contained in paragraph 2 of Article 7, and paragraph 5 does clearly apply to bays of greater width, nevertheless there is obviously a point at which an indentation becomes so wide that it cannot be considered "landlocked." For example, the Bay of Biscay, about 280 miles from headland to headland, easily meets the semicircle test; but few who have crossed it would think of describing it as "landlocked." The

Gulf of Carpentaria, on the northern coast of Australia, is about 300 miles wide and certainly is not landlocked although it meets the semicircle test by a generous margin. See, in this connection, discussion by J. P. A. François, rapporteur for the Convention, at 1 *Yearbook of the International Law Commission* (1955) 207. Without suggesting that there is some specific distance that always sets a limit on what may be considered "landlocked," we do say that size and shape are complementary factors to be considered in combination, and that for waters to be landlocked, the degree of enclosure must increase as the width of the entrance increases.

By this standard "Ascension Bay" is much too wide and too open to be considered landlocked.

Third, "Ascension Bay" fails to meet the semicircle test, given a proper application. Without adding the separate inner bays into a mathematical aggregation, Ascension Bay fails by nearly 8 percent to meet the semicircle test. The aggregation is impermissible, because it is only a statistic unrelated to geographical reality. A person who had left any of the inner bays and traversed the island screen would never dream of saying that the waters he faced were part of the same "well-marked indentation" he had left behind him.

The question of how far to include subsidiary or tributary water areas, in measuring an indentation for purposes of the semicircle test, has not yet been definitively answered. One suggestion is to apply the semicircle test first to each tributary area separately, drawing the appropriate closing line for each one that meets the test, and then to count as part of the

main indentation only those tributary areas that cannot be closed off from it as separate bays by this process. Shalowitz, *Boundary Problems Raised by the Submerged Lands Act* (1954) 54 Columbia L. Rev. 1021, 1033, fn. 33; 1 Shalowitz, *Shore and Sea Boundaries* (1962) 220, fn. 28. This would clearly exclude the inner bays on which Louisiana relies to make up the necessary area for "Ascension Bay." That procedure may be unduly restrictive, as applied to open areas like West Bay that have some substantial unity with the outer area. For present purposes, it is enough to say that account cannot be taken of bodies of water, even if interconnected, that are completely separate geographical entities. As we have already noted with respect to the claim for "Outer Vermilion Bay" (*supra*, p. 59), it takes more than a connecting channel to make two bays into one bay, just as it takes more than a connecting door to make two rooms into one room.[47]

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[47] Even if "Ascension Bay" were landlocked and met the semicircle test, still paragraph 5 of Article 7 would not justify the procedure that Louisiana advocates. What paragraph 5 permits is treating as inland waters so much of an oversized bay as may be enclosed by one 24-mile line. What Louisiana has done is to describe within "Ascension Bay" *eight* closing lines totaling *38.28* miles. Those lines, for which we have computed the lengths from the plane coordinates of their termini, are set out in paragraphs (o) through (s) of Louisiana's proposed decree as follows (La. Resp. and Opp. 77–79):

West Bay, between x = 2,607,290, y = 93,040, and x = 2,615,450, y = 157,770 (paragraph (o), pp. 77–78), 65,242.3 ft.; the northern entrance to Pass du Bois, between x = 2,613,550, y = 164,745, and x = 2,613,585, y = 166,700 (paragraph (p), p. 78), 1,955.3 ft.; the unnamed bay south of Tiger Pass, between x = 2,614,070, y = 171,910, and x = 2,609,880, y = 177,025

2. Beach Erosion Jetties at Grand Isle

Two groups of jetties to control beach erosion have been built along the Gulf shore of Grand Isle, extending out into the Gulf from the low-water line from 100 to 300 feet. One group of four jetties about 800 feet

(*ibid.*), 6,612.1 ft.; Tiger Pass, between x = 2,609,880, y = 177,025, and x = 2,608,270, y = 178,325 (*ibid.*), 2,069.3 ft.; the southeastern entrance to Sandy Point Bay, between x = 2,593,340, y = 201,660, and x = 2,589,100, y = 204,125 (paragraph (r), p. 78), 4,904.4 ft.; the northwestern entrance to Sandy Point Bay, between x = 2,587,400, y = 205,250, and x = 2,585,000, y = 206,975 (*ibid.*), 2,955.6 ft.; Scofield Bayou, between x = 2,565,940, y = 212,988, and x = 2,563,010, y = 214,045 (paragraph (r), p. 79), 3,114.8 ft.; and a line from the Empire Canal east jetty, x = 2,550,402, y = 216,158, to x = 2,406,889.83, y = 189,733.09 (paragraph (s), p. 79), 145,924.7 ft. These total 232,778.5 feet, or 38.28 miles.

All but the last of these lines cross entrances to what are unequestionably inland waters. As discussed below, we think that some of them are drawn too far gulfward; but our present objection is not to how they are drawn, but to the fact that these waters, which Louisiana must consider part of "Ascension Bay" in order to meet the semicircle test, are now being shut off, as parts of the bay to be considered inland waters, far in excess of what can be so shut off by one 24-mile line as paragraph 5 of Article 7 requires.

It is not clear just how paragraph 5 operates in all circumstances. Certainly it permits use of a single 24-mile line. We may assume that it also permits use of two or more lines, totaling 24 miles, supplemented by intervening islands, to enclose some one part of an oversized bay. It is by no means clear that it would permit the 24 miles to be divided so as to enclose two separate parts of the bay—for example, coves at opposite ends of a C-shaped bay, where neither part otherwise qualifies as inland waters. That particular question is not presented here, but we do have the somewhat similar problem of closing off several parts of the bay, all but one of which could qualify independently as inland waters. One possible solution would be to take paragraph 5 literally, and say that the only permissible way to take advantage of its benefits is to treat as inland waters

apart begins about a mile northeast of Caminada Pass. Another group of ten jetties about 760 feet apart extends to within about two miles of Barataria Pass. Louisiana argues that the United States has erred in not using these jetties as part of its description of the coastline along the shore of Grand Isle. La. Resp. and Opp. 49–50.

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so much of the bay as can be enclosed within one 24-mile line, and that if this is done, no other waters of the bay can be considered inland waters, no matter what their individual configurations. This may well be exactly what the paragraph means. A more liberal view would be to construe "a line" of 24 miles as meaning "lines totaling 24 miles," and to allow several parts of the bay to be closed off separately within that total limit. Another possible approach would be to treat tributary indentations as separate bodies of water, excluding them from consideration in determining the overall area of the bay for purposes of the semicircle test and also excluding their closures from consideration in applying the permitted length of 24 miles. Presumably it would always be permissible for the coastal nation to forego reliance on paragraph 5 altogether, and to treat tributaries as inland waters on their individual merits, without regard to the aggregate length of their closing lines; but if such a choice is to be made, it must obviously be by the nation, not by the State, just as in the case of drawing straight baselines under Article 4 of the Convention. *United States* v. *California*, 381 U.S. 139, 168.

Whatever the ultimate decision may be as to how paragraph 5 should be applied, the one thing that is perfectly clear now is that it cannot be as Louisiana seeks to do: to take the tributary bays into account in computing the area of the indentation for purposes of the semicircle test, while disregarding them in measuring the parts of the bay to be closed off by the 24-mile line. If the tributaries are part of the bay for the purpose of bringing it under paragraph 5, they must be part of the bay for the purpose of applying paragraph 5—which means, at the very least, that all their closing lines must be included in the total length of 24 miles that paragraph 5 allows for enclosure of waters of the bay.

The question turns on Article 8 of the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. (Pt. 2) 1609:

> For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast.

We submit that beach erosion jetties do not qualify under Article 8. The highly restrictive language establishes three requirements: (a) the improvements must be *harbor* works; (b) they must be permanent; and (c) they must be an integral part of the harbor system. Since there is no harbor whatsoever on the gulfward shore of Grand Isle, the beach-erosion jetties are neither *harbor* works nor an integral part of a harbor system. On its face, Article 8 is not applicable.

To overcome this difficulty, Louisiana quotes the commentary of the International Law Commission that accompanied its draft of this Article:

> (2) Permanent structures erected on the coast and jutting out to sea (such as jetties and coast protective works) are assimilated to harbour works. [*Report of the International Law Commission Covering the Work of Its Eighth Session,* U.N. General Assembly, Official Records: Eleventh Session, Supplement No. 9 (A/3159) 16; 2 *Yearbook of the International Law Commission* (1956) 270.]

In that draft of the Convention the articles had captions.[48] Article 8 was captioned "Ports." Read in

[48] All captions were omitted from the Convention as adopted.

that context and bearing in mind the very explicit restrictions expressed in the text of Article 8, the commentary is readily seen to be no more than a statement that the Article was not limited to actual docking facilities, but included all the permanent structures which are part of a port, including breakwaters, shore protection structures, and other integral components. To read paragraph 2 of the commentary out of that context, as embracing all coast-protective works wherever situated, would negate the clear restrictions of the text of the Article. So construed, it would be not a commentary but a complete departure from the stated subject matter.

Thus, minor jetties built along open beaches to control erosion are not "permanent harbour works which form an integral part of the harbour system" within the meaning of Article 8.

I. EMPIRE CANAL TO SOUTHWEST PASS

Identification of the headlands of West Bay raises the only major dispute in this segment, but six small differences also require mention.

1. Dredged channel at Empire Canal

The dredged channel at Empire Canal is not part of the baseline for reasons discussed at pp. 51–56, *supra*.

2. Southern headland at Sandy Point Bay

Louisiana omits the turning point of our description at x=2,590,100, y=203,860, which is at the southern headland to the southeastern entrance of Sandy Point Bay. La. Resp. and Opp. 78. This would put

the southern terminus of the closing line at a point which is in no sense a natural headland. See Figure 8, p. 110, *infra*.

3. Spoil bank at Pass Tante Phine

At Pass Tante Phine Louisiana treats a spoil bank uncovered at low tide as part of the coast.[49] We disagree.

The spoil bank was created by the Gulf Refining Company, under a permit dated May 21, 1956, which authorized the dredging of a channel but did not authorize the creation of a spoil bank.[50] If any meaning is to be given to the Court's statement in *United States* v. *California*, 381 U.S. 139, 176, that "the United States, through its control over navigable waters, had power to protect its interests from encroachment by unwarranted artificial structures," an unauthorized shore extension of this sort must be disregarded. To hold otherwise would invite companies holding State leases to make unauthorized extensions of the shore, thus bringing federal lands into their State leases rather than having to secure them from the United States by competitive bidding.[51]

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[49] The tip of the low-tide spoil bank is shown on the 1959 survey at x=2,602,020, y=183,550, Paragraph (q), La. Resp. and Opp. 78. Because a three-mile arc from that point would supersede a three-mile belt measured from the shore in that vicinity, Louisiana has found it unnecessary to include in its description nine of our turning points along the shore (x=2,600,780, y=192,900, through x=2,605,125, y=182,710, U.S. Mot. 28).

[50] This was stated in the memorandum in support of our motion, p. 75, and has not been denied by Louisiana.

[51] We do not mean to imply that any such motive was involved in the present case. Presumably the spoil was dumped simply as the most convenient means of getting rid of it.

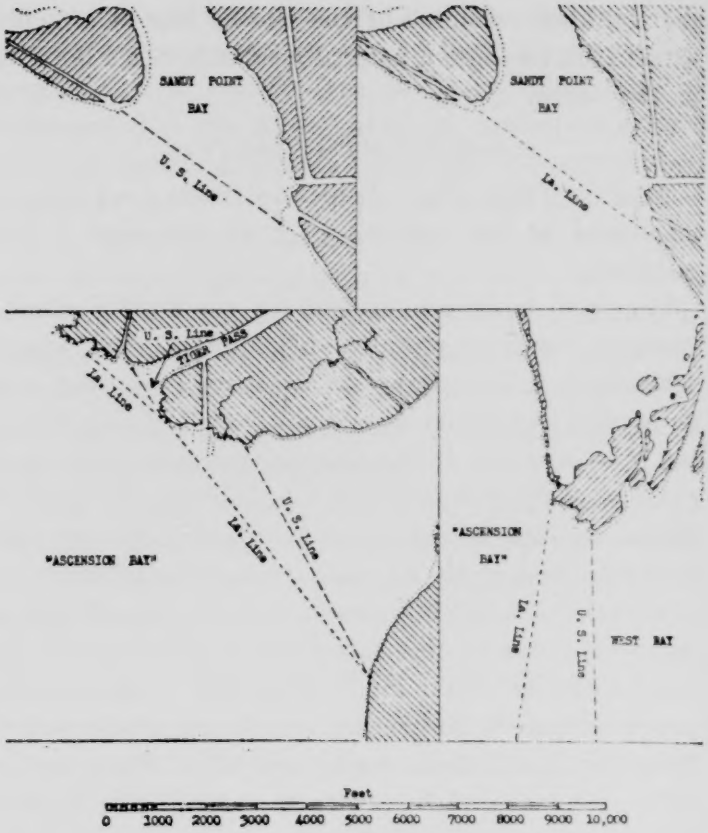

FIGURE 8

Quite apart from the question of authority, a mere spoil bank of this sort is an improper baseline for the territorial sea. This is not like "the situation * * * when a State extends its land domain by pushing back the sea," *United States* v. *California*, 381 U.S. 139, 177. Here is no purposeful or useful reclamation work, only a convenient disposal of refuse. Such

spoil banks are generally short-lived. Indeed, they are often placed with the specific expectation that they will soon be dispersed by tidal action. If the Court were to hold that a transitory refuse dump of this sort can deprive the United States of valuable oil land—counting the Pass Tante Phine dump as coast would affect about one square mile—then the Corps of Engineers would have to require spoil to be dumped farther out at sea. There is scant merit in a rule that would impose heavy and useless expense on those dredging in coastal waters.

In any event, the spoil dump at Pass Tante Phine is now submerged even at low tide. That statement, made on the authority of the Corps of Engineers in the memorandum in support of our motion (p. 75) has not been denied by Louisiana. Consequently, it cannot affect the present baseline.

4. Tiger Pass

At Tiger Pass and the unnamed indentation just south of Tiger Pass, Louisiana would draw closing lines somewhat farther seaward than those suggested by the United States, omitting in each case the point used by the United States as the northern headland (x=2,609,110, y=178,140, at Tiger Pass; x=2,611,496, y=176,505 at the anonymous bay) and using in its place our next turning point northward. The question is simply one of deciding what are the "natural entrance points" to the inland waters. The situation is illustrated by Figure 8, *supra,* p. 10. We can add little in the way of verbal argument, for the choice, which makes little difference in the three-mile line, must be based upon visual impression.

5. West Bay

The chief difference here concerns the identification of the headlands between which to draw the closing line of West Bay. On the northern side, Louisiana omits our choice, x=2,616,265, y=157,185 (U.S. Mot. 29), in favor of our next turning point to the northwest, 815 feet farther seaward. On the southern side, we would use a slight promontory at Lighthouse Bayou (x=2,617,735, y=117,450; U.S. Mot. 29), while Louisiana would move more than four miles farther south, to the tip of the eastern jetty at Southwest Pass (paragraph (o), La. Resp. and Opp. 77–78).

The situation is adequately shown on La. Resp. and Opp., Exh. 3. In our view, our choice of southern headland is a generous one. We cannot regard the shore and jetty of Southwest Pass, from that point southward, as having any significant effect in enclosing the waters of West Bay, nor does it seem to us that a person passing the tip of the jetty at Southwest Pass has "entered" West Bay in any meaningful sense. In the absence of any comparable precedent, the decision must depend largely—and in the case of the northern headland exclusively—upon the Court's own evaluation of the situation disclosed by the map.

In the case of the southern headland, however, Louisiana's proposal apparently defeats her whole claim to West Bay. Louisiana's closing line is 65,242.3 feet long, about 10.73 miles. A semicircle based on that line has an area of about 45.13 square miles. West Bay, as delimited by Louisiana, appears to contain only about 38 or 39 square miles, unless one includes such areas as Bob Taylor's Pond, Zinzin Bay, or Riverside Bay.

In our view, those areas are too definitely separated from West Bay to be considered a part of it, although we recognize the propriety of including Dixon Bay, Scott Bay, and the unnamed area just west of Bob Taylor's Pond, which are only sketchily outlined by scattered shoals and islands and have a substantial unity with the main body of West Bay. See pp. 99–104, *supra*, for a discussion of the applicable principles. The same cannot be said of the other areas mentioned. As the map shows, they have their own definite configurations, and connect with West Bay only through narrow channels.

6. Dredged channel at Southwest Pass

The dredged channel at Southwest Pass is not part of the baseline. See pp. 51–56, *supra*.

J. SOUTHWEST PASS TO MAIN PASS: MISSISSIPPI RIVER DELTA

In our view, the Convention should be applied to the Mississippi Delta in the same fashion as all other coasts. Louisiana, in addition to making specific objections to our application, claims the waters of the Delta in gross upon essentially two lines of argument.

One leg of the argument is that the delta is a geologically and historically unique geographical unit, to which the river has great economic importance (La. Resp. and Opp. 41–42). Possibly, some of those factors bear upon the question of whether the United States could, if it wished, justifiably draw straight baselines around the delta under Article 4 of the Convention, 15 U.S.T. (Pt. 2) 1608; but since the United

States has not drawn such baselines, the question is academic. *United States* v. *California,* 381 U.S. 139, 167–168. Geological and economic peculiarities are irrelevant to the demarcation of bays and other inland waters under the international standards established by the Convention, as are all historical peculiarities other than sovereign assertions of jurisdiction. Scattered about the earth are many maritime areas for which a nation could claim some degree of geological, historical, or economic uniqueness. It was undoubtedly for the purpose of avoiding such variables that international law developed on the basis of the strictly geographical data appearing on mariners' charts. Otherwise, it would be impossible to have a uniform set of international rules.

The other leg of Louisiana's argument is that the "waters of the delta" are historically inland waters. There is no justification for lumping waters of the Gulf that do not meet the requirements of the Convention into one category with all the rivers, enclosed lakes, and landlocked coastal indentations that meet the semicircle test. As to each of the latter, no historical assertion of jurisdiction is necessary to classify it as inland waters. With respect to the former, we are aware of no historic assertions of jurisdiction. An effective historic claim would depend upon assertions of sovereignty by the United States. See Brief for the United States in *United States* v. *California,* No. 5, Original, October Term 1963, pp. 163–171.

The territorial sea in the area of the Mississippi Delta must therefore be demarcated in the same man-

ner as off other sections of the coast. Accordingly, we turn to the specific points at issue.

1. East Bay

East Bay fails to meet the semicircle test of a bay established by Article 7 of the Convention. Consequently, the three-mile line is governed by a coastline along the shore and controlling points on low tide elevations within three miles of the coast.[52]

Louisiana argues that the semicircle test should not be applied because East Bay has a "peculiar geographic configuration." La. Resp. and Opp. 44. Every indentation has its own peculiar geographical configuration, and meets or fails to meet the test because of it. East Bay fails, and that ends the matter.

Louisiana also urges that East Bay formerly met the semicircle test, and fails now only because the extension of the passes has broadened the entrance. However, we are unable to find any place within the indentation where a line could be drawn so as to enclose enough water to meet the semicircle test, that would be any farther seaward than the base line and points we recognize. It is immaterial that the change in East Bay has resulted from operations of the United States in maintaining the navigational channels. La. Resp. and Opp. 45. Certainly those operations, begun as early as 1880 at South Pass and in 1903 at Southwest Pass,[53] had no ulterior motive of defeating Louisiana's title to the bed of East Bay.

[52] These points make it unnecessary to consider the character of the smaller indentations along the shore of East Bay.

[53] See 1 *Annual Report of the Chief of Engineers, U.S. Army* (1880), H. Exec. Doc. No. 1, Pt. 2, vol. 2, pt. 1, 46th Cong., 3d

By definition, every artificial change in the coastline is made by someone; and in holding that artificial changes in the coastline produce corresponding changes in submerged land ownership, the Court made no exception for the case where the party making the change is the beneficiary of the title transfer. *United States* v. *California*, 381 U.S. 139, 177. On the contrary, it held that the State would gain title where it pushed back the sea. We cannot suppose that the United States stands in any worse position than a State in relation to the consequences of bona fide navigational improvement projects. In the case of West Bay Louisiana has not hesitated to make use of the coastline as extended out about four miles by the very same coast extensions at Southwest Pass.

2. Garden Island and Redfish Bays

Louisiana would place the eastern headland on a minute islet about 5,000 feet south of the headland used by the United States. The formations involved, shown in Louisiana's Exhibit 3, appear in more detail in Figure 9 opposite. Like our other large-scale diagrams, Figure 9 shows both the high- and low-water lines (by solid and dotted lines, respectively), as this conveys a better understanding of the situation.

Our reasons for rejecting islands as headlands have been explained at pages 60–66, *supra*. As appears from Figure 9, our own headland is on what is technically an island, as it is separated by a narrow channel from

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sess. (Cong. Doc. Ser. No. 1953), p. 141; 1 *Annual Report of the Chief of Engineers, U.S. Army* (1905), H. Doc. No. 2, vol. 5, 59th Cong., 1st sess. (Cong. Doc. Ser. No. 4946), pp. 355–359.

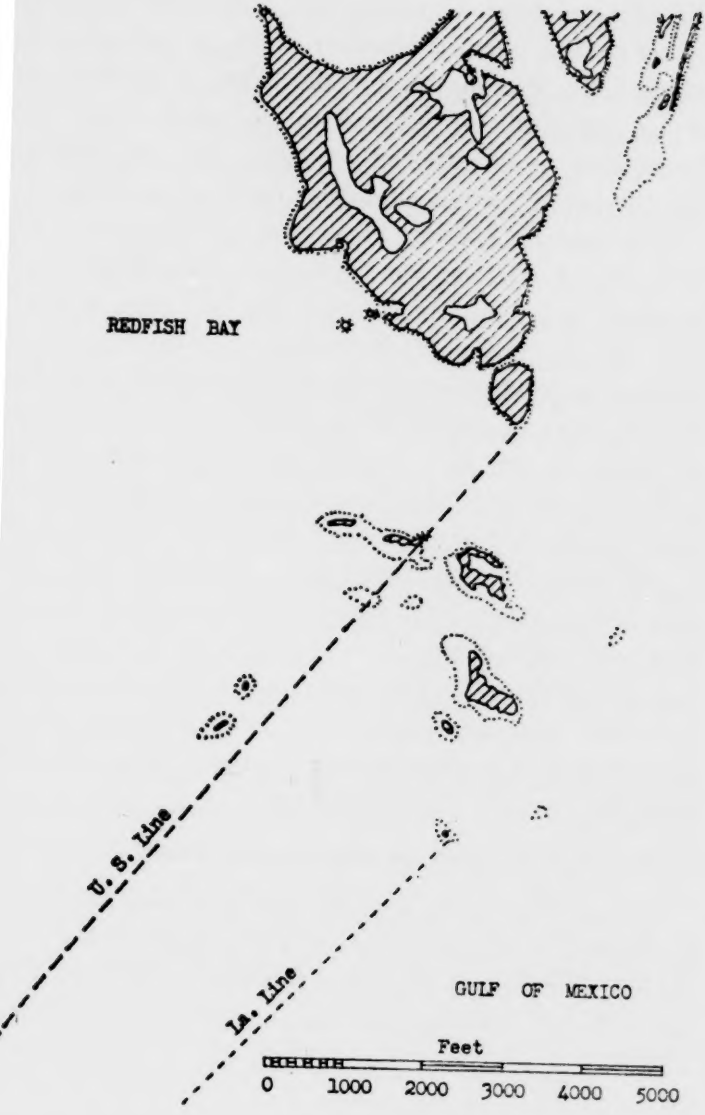

FIGURE 9

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the adjacent land. However, that land itself is broken up by similar channels farther north, as indeed is the whole delta. For the reasons discussed at pages 93–94, *supra,* we think it is realistic to treat these land formations as substantially continuous, disregarding the network of small channels intersecting them.

This reasoning, however, cannot be extended to the islet that Louisiana would use as a headland. Our headland is on an island about 800 feet long, essentially a prolongation of the mainland formation, from which it is separated by a channel hardly 30 feet wide at low tide. Louisiana's headland is on an isolated point, about 300 feet long at low tide but barely 50 feet long at high tide, separated from the nearest islet by about 1000 feet and from the mainland by about 5000 feet. Measured along a direct line, that distance is about 3600 feet of water to 1400 feet of land, even at low tide. The shortest possible series of water crossings to the mainland totals about 3200 feet. The islet, therefore, is in no sense part of the mainland, and is not a proper headland from which to draw the closing line of the bay.[54]

3. Southeast Pass to Main Pass

a. In our view this segment of the three-mile line is controlled by salient points and two short stretches of shore on offlying islands and low-tide elevations. U.S. Mot. 31–33, paragraphs (mm)–(pp). This makes it

[54] Of course it does have its own three-mile belt of territorial sea, which overlaps and merges with the territorial sea of the mainland and of Redfish Bay, as recognized by our proposed decree.

unnecessary to delineate the inland waters along this section of the coast.

Louisiana, on the other hand, would draw a straight line between the islet at Redfish Bay, just discussed, and the southernmost islet off Pass a Loutre, a distance of 6.9 miles. La. Resp. and Opp. 76, paragraph (f). Louisiana justifies this line as being the closing line of Blind Bay (La. Resp. and Opp. 42–43); but Louisiana's Exhibit 3 plainly refutes that contention. Blind Bay is a well marked indention between Pass a Loutre and Northeast Pass. Northeast Pass entirely separates it from the waters to the south, which have no unity of configuration with it. Between Northeast Pass and Southeast Pass the coast is only slightly curved, and as a whole falls far short of meeting the semicircle test. Many small intentions within it are inland waters, but their delimitation is rendered unnecessary by the presence of islands and low-tide elevations that provide more extended base points for the three-mile limit.

We have already shown that islands far off shore cannot be used as headlands of a bay. See pp. 60–66, *supra*. Louisiana argues that there is special justification for the procedure here, because Pass a Loutre is growing out toward the islands. But current lines must be based on current conditions. An ambulatory boundary exists where physical conditions put it on any given day, neither where they have put it in the past nor where they may put it in the future. The future is uncertain, moreover, particularly on the Louisiana coast. Areas that build out at one time often erode at another. Northeast Pass is regressing. La.

Resp. and Opp. 43. Perhaps changing conditions will cause Pass a Loutre soon to regress. If Pass a Loutre continues to extend, the inland waters of Blind Bay will extend with it; and if they reach a point where they would justify a three-mile limit farther seaward than one measured from the islands, it will be proper to establish such a limit at that time.

Nor can the use of the islands be justified as a way of drawing a straight baseline under Article 4 of the Convention, for the United States has never promulgated a straight baseline in this area. *United States* v. *California,* 381 U.S. 139, 168.

b. Opposite Pass a Loutre and North Pass, our proposed decree uses a series of isolated base points on two groups of tiny islets and low-tide elevations about two miles from shore. Louisiana uses the same points, with the addition of one at x=2,754,925, y=203,475. La. Resp. and Opp. 75, paragraph (d). Our computations indicate that that point will not affect the three-mile line as measured from the two adjacent points; but we agree that the additional point should be included, if it does have an effect.

K. MAIN PASS TO SHIP ISLAND: CHANDELEUR AND BRETON SOUNDS

Both parties, treating Breton and Chandeleur Sounds as inland waters, agree that the central portion of this segment of the baseline should follow the eastern side of the line of the Chandeleur Islands. The two portions in dispute are the closing lines at the southern and northern ends.

At the southern end we would draw the closing line from the eastern headland of Main Pass to the near-

est point on the shore of Breton Island. Louisiana seeks a line from a tiny islet two miles off the entrance of North Pass (at or near the easternmost point of the Mississippi Delta) northwardly to the eastern tip of Grand Gosier Island.[55]

At the northern end both parties would start at the northernmost point of the Chandeleur Islands and run to Ship Island. We would draw the shortest possible line to Ship Island, running to the closest point on its southern shore. Ship Island was formerly two islands. Louisiana would draw a longer line to what was formerly the easternmost extremity of the western island.

1. The basic fallacy in Louisiana's position with respect to both ends of this segment is that, under the rules of the Convention, Breton and Chandeleur Sounds are not inland waters. Waters between the mainland and coastal islands do not have the status of inland waters unless the coastal nation elects to enclose them by straight baselines under Article 4. See pp. 60–66, *supra*. Prior to the Convention there was no international consensus, but the United States had taken the position that such areas were inland waters at least in some circumstances. Accordingly, in all proceedings in this case and its predecessor prior to 1964, we treated Chandeleur and Breton Sounds

[55] From North Pass to Main Pass, we continue using as base points salient points on offshore islets—that is, the outermost points whose use can have an effect on the three-mile line. We do not discuss those points as such, because Louisiana has not challenged them apart from the above claim to a straight-line closing between the islet off North Pass and Grand Gosier Island.

as inland waters. *United States* v. *Louisiana*, No. 13, Original, October Term, 1948; No. 12, Original, October Terms, 1949–1950; No. 7, Original, October Terms, 1951–1960.[56] The Court followed our assumption in a footnote in *United States* v. *Louisiana*, 363 U.S. 1, 66–77, although it added the caveat that "We do not intend * * * to settle the coastline of Louisiana or that of any other State."

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[56] In 1950 federal officials described the line, commonly known as the "Chapman Line," representing the federal position as to the proper coast line of Louisiana, which drew closing lines across the entrance of Breton Sound from the northern headland of Grand Bay, to Breton Island, by way of Bird Island, and across the entrance of Chandeleur Sound from the northern tip of the northernmost of the Chandeleur Islands to the western tip of the westernmost of the Ship Islands. On March 16, 1951, the United States asked Louisiana for an accounting on the basis of that line, under the decree of December 11, 1950, 340 U.S. 899. That line was used also as the baseline of the three-mile belt, called "Zone 1," which Louisiana is allowed to administer without impoundment of proceeds under the Interim Agreement of October 12, 1956. See Agreement Between United States of America and State of Louisiana Pursuant to Section 7 of the Outer Continental Shelf Lands Act and Act 38 of the Louisiana Legislature of 1956, paragraphs 2(a) and (6), and Exhibit "A" thereto, filed herein October 12, 1956, pursuant to the order of June 11, 1956, 351 U.S. 978, and Amended Exhibit "A," January 28, 1957, filed June 11, 1957. On the same basis we conceded in 1958 that the waters between the mainland and islands belonging to Louisiana under its Act of Admission were in fact sufficiently enclosed to constitute inland waters under the principles then being followed by the United States. See *United States* v. *Louisiana*, 363 U.S. 1, 67, fn. 108. Paragraph 3(d) of the supplemental decree of December 13, 1965, 382 U.S. 288, 292, entered on motion of the United States without objection by Louisiana, awarded to Louisiana certain submerged land in the entrance of Breton Sound on the same basis, but with a somewhat more liberal closing line across Breton Sound, as discussed at pages 126–129, *infra*.

The 1965 decision in *United States* v. *California*, 381 U.S. 139, holding that the baseline is to be drawn in accordance with the 1961 Convention, showed our assumption to be wrong. Nevertheless, we do not now claim for the United States the areas previously assumed to be inland waters, because we think it would not be in the public interest to upset, at this date, a postulate that has guided the conduct of both parties and their lessees in a large area over a long period of time. But since the concession related to specific areas and was expressed in geographic terms, we should not be precluded from relying upon the Convention in resisting Louisiana's effort to add adjoining waters, never within the concession, to those we are willing to concede.

Under the Convention it is entirely clear that neither Breton and Chandeleur Sounds nor the waters Louisiana seeks to add qualify as inland waters. Closing lines may not be drawn between and along islands in order to form bays unless the islands are in the mouth of an indentation—with mainland headlands—that satisfies Article 7. See pp. 60–66, *supra*. Plainly, the waters known as Breton and Chandeleur Sounds do not meet that requirement. The only exception is for straight baselines promulgated by the coastal nation under Article 4. The United States has not elected that course. Consequently, the coast line in this whole area follows the customary low water line on the shore of the mainland and separately around each island, with exceptions for qualifying bays, all of which are well inside Breton Island and

the Chandeleur Islands. The controverted areas are all outside that line.

The grounds advanced by Louisiana for claiming the sounds as inland waters without regard to our concession cannot survive careful scrutiny. Footnote 108 of the 1960 opinion, 363 U.S. at 66–67, cited by Louisiana, merely recites and accepts the government's concession; it has no tendency to show the status of the sounds apart from that concession. Moreover, the footnote concludes with the clear caveat, "We do not intend, however, in passing on these motions, to settle the location of the coastline of Louisiana or that of any other State."

The fact that an area of water behind islands is not a useful route of international navigation does not prove that it is inland waters; it merely eliminates one disqualification for such status. *United States* v. *California,* 381 U.S. 139, 171, is not helpful to Louisiana. California attempted to analogize the Santa Barbara Channel to Chandeleur and Breton Sounds, upon the assumption that the sounds were inland waters. The Court rejected the analogy upon the ground that the channel was a useful international route between two areas of high seas, whereas the sounds were not. Consequently, there was no occasion to determine the actual status of the sounds.

Nor does *Louisiana* v. *Mississippi,* 202 U.S. 1, support Louisiana. The opinion recognized Mississippi Sound as inland waters (202 U.S. at 48), but it did not so characterize Chandeleur or Breton Sounds or recognize the Chandeleur Islands as part of Louisiana's coast. On the contrary, the Court said that the

coast line was along the marshes of the St. Bernard Peninsula. "We are of opinion that the peninsula of St. Bernard in its entirety belongs to Louisiana; that the Louisiana Marshes at the eastern extremity thereof form part of the coast line of the State; and that the islands within nine miles of that coast are hers * * *." 202 U.S. at 47.

The shallowness of the sounds, their lack of utility for international commerce, and their economic value to citizens of the United States (La. Resp. and Opp. 39) might be factors to consider in determining whether the sounds would qualify for enclosure by straight baselines under Article 4 of the Convention, 15 U.S.T. (Pt. 2) 1608, but they have nothing to do with the geographical criteria of penetration and enclosure which determine the status of waters under the Convention in the absence of straight baselines or historic title. Only the federal government can draw straight baselines, and it has not followed that course. *United States* v. *California*, 381 U.S. 139, 168.

Louisiana also argues (La. Resp. and Opp. 39) that "since 1895 the waters have been situated behind the lines drawn pursuant to the Act of February 19, 1895, as amended, and have been subject to continuous jurisdiction by the nation and the state." She fails to mention any assertion of "continuous jurisdiction" beyond the announcement of those navigational lines. As we have already shown, the navigational lines have no relationship to territorial jurisdiction. See pp. 18–46, *supra*.[57]

[57] Louisiana overstates the case in asserting that the sounds have been within such lines "since 1895" (La. Resp. and Opp.

In sum, the true coastline does not enclose either the sounds or the disputed waters in their vicinity. The government's concession is the only basis for drawing a baseline farther out; the line is determined by the limits of the concession; and the disputed areas should be awarded to the United States.

2. Even if Breton and Chandeleur Sounds were inland waters, the southern and northern closing lines should not be drawn as proposed by Louisiana. Since each depends upon its own environment, we discuss them separately.

a. Southern Closing Line. In 1950, in drawing the Chapman Line, the United States closed the entrance to Breton Sound by the shortest lines then possible: from the northern headland of Grand Bay to the southern end of Bird Island, a distance of 0.9 miles, and from the northern end of Bird Island to the western end of Breton Island, a distance of 6.1 miles, making a total of 7 miles.

By the time of the joint mapping project in 1959, the eastern headland of Main Pass had extended itself

39). Treasury Circular No. 127, July 13, 1895, designated a line from Pass a Loutre Light to Error Island (the present site of Error Shoal); but did not otherwise enclose Chandeleur or Breton Sounds. Treasury Dept., *Synopsis of Decisions* (1895) 702, 703. The northern entrance to Chandeleur Sound was not so enclosed until July 12, 1900, and then by a line running directly to Chandeleur Lighthouse from Sand Island Lighthouse outside Mobile Bay. Treasury Dept. Circular No. 107, 3 Treas. Dec. (1900) 592, 595. That was replaced on November 18, 1935, by the present line running in two segments, from the Mobile Entrance Lighted Whistle Buoy to Ship Island Lighthouse, thence to Chandeleur Lighthouse. Dept. of Commerce Circular No. 230, (6th ed., Nov. 18, 1935) 16; cf. 33 C.F.R. § 82.95. See *supra*, pp. 20, 31, and Figure 2, *supra*, p. 32.

to within 6 miles and 276 feet of the southern shore of Breton Island, and its growth appeared to be continuing.[58] This crossing was already shorter than that used in the Chapman Line. The three-mile belts from the two sides probably would meet within the near future, as soon as Main Pass extended itself another 276 feet. Consequently, we concluded, purely as a practical method of rounding out our concession, that the shorter crossing should be substituted for the Chapman Line. See Supplemental Decree of December 13, 1965, 382 U.S. 288. The shorter line is more favorable to Louisiana.

Louisiana proposes to close off a larger area by a line 21.3 miles long from the eastern extremity of Grand Gosier Island to a tiny islet about two miles off the entrance of North Pass. La. Resp. and Opp. 40–41; 75, Paragraph (b); Exh. 4.[59] Louisiana's claim that these waters "qualify as inland waters under the tests of the Convention" (La. Resp. and Opp. 40) discloses a complete misunderstanding of those tests.

First, an isolated line between two islands, such as Louisiana describes here, does not complete the enclosure of any area whatsoever; and if this line is combined with such other lines as are necessary to complete an enclosure, the aggregate length far exceeds the permissible maximum of 24 miles.

Article 7 of the Convention on the Territorial Sea and the Contiguous Zone provides, in paragraph 3,

[58] We are not informed of its actual development since that time.

[59] Counsel call the area "Isle au Breton Bay." Although the nomenclature would have no legal significance, it seems worth noting that we find no authority for it.

that where a bay has more than one entrance, the length of all the entrances is to be aggregated to determine the length of diameter of the semicircle to which its area will be compared. 15 U.S.T. (Pt. 2) 1609. Paragraph 4, imposing a maximum length of 24 miles for the closing line, does not specifically repeat the provision for aggregation of separate entrances, but it is obviously implicit, and was made express in the commentary of the International Law Commission which accompanied the draft article: "If, as a result of the presence of islands, an indentation whose features as a 'bay' have to be established has more than one mouth, the total length of the lines drawn across all the different mouths will be regarded as the width of the bay." *Report of the International Law Commission Covering the Work of its Eighth Session* (U.N. General Assembly, Official Records, 11th Sess., Supp. No. 9, U.N. Doc. A/3159) 15; 2 *Yearbook of the International Law Commission* (1956) 269.

From the islet used by Louisiana as the southern terminus of the "closing" line, the shortest possible line or combination of lines to shore is almost exactly two miles. From Grand Gosier Island, used by Louisiana as the northern terminus of the "closing" line, the shortest possible combination of lines to shore (via Breton Island and Main Pass), is over 10 miles. These apparently are the lines that Louisiana would use to delimit the "bay," as the area so enclosed corresponds to the 165,000-acre area stated by Louisiana (La. Resp. and Opp. 41). Adding these lines to the 21.3 miles stated by Louisiana for the "closing"

line from Grand Gosier Island to the islet off North Pass (La. Resp. and Opp. 75) gives a total of over 33.3 miles, far in excess of the 24-mile limit.

Second, this part of the Gulf of Mexico is neither an indentation nor landlocked, as Article 7 requires. See pp. 99–103, *supra*. Its combined shorelines, generalizing the detailed convolutions of the delta, total no more than 26 miles, as compared with over 33.3 miles of closing lines across water. That is, its perimeter is about 56.2 percent water and only about 43.8 percent land. Of the 360-degree circumference of the horizon seen from the center of the area, about 225 degrees is water and only about 135 degrees, or 37.5 percent, is land. This is not "landlocked" by any conceivable definition, nor is it an "indentation."

Third, even if the area were bounded by land everywhere except at the closing line described by Louisiana, still there would be no justification for using the northern end of Grand Gosier Island as the northern headland. Louisiana says that this is "the point at which the coast begins to turn in to form the indentation" (La. Resp. and Opp. 41); but the map does not bear this out.[60] Even if there were a bay, the eastern extremity of Grand Gosier Island would not be its headland.

[60] The shore of Grand Gosier Island continues almost exactly the direction of the closing line from the Curlew Islands. Even if one looked only to the shore of Grand Gosier Island, the northern end is the point where the shore facing the open Gulf on the east turns westward into the sheltered waters of Chandeleur Sound, not a point where any shore facing the open Gulf turns southwestward to form "Isle au Breton Bay."

b. Northern Closing Line. The Chapman Line ran from the northernmost point of the Chandeleur Islands toward the westernmost point of the Ship Islands, as far as the Mississippi boundary. However, a shorter line can be drawn from the Chandeleur Islands to a more central point on the south shore of the western Ship Island. To the extent that the area is landlocked at all, it obviously is more so at the narrower crossing. Since it seems arbitrary to insist on our original crossing to the western end of the Ship Islands when a shorter crossing line can be drawn that is more favorable to Louisiana, we propose the latter line as the more practical way of rounding out our concession.

Louisiana proposes a closing line here between the northernmost extremity of the Chandeleur Islands and a point that it describes as "the easternmost extremity of the westernmost island of the Ship Island couplet," which it takes to be the "natural entrance point." La. Resp. and Opp. 39–40; 73; Exh. 4. As we have already noted, Ship Island consisted formerly of two parts, separated by a narrow channel. See U.S.C. & G.S. Chart No. 1267, 6th ed., March 10, 1947, as revised January 14, 1957. However, the channel has now become filled in, joining the two parts into a single island. U.S.C. & G.S. Chart No. 1267, 13th ed., October 2, 1967. Since the eastern and western islands are now joined, whatever significance the eastern end of the western island may once have had as a "natural entrance point" (we think it had none) has now disappeared.

There is a great dearth of authority on the identification of "natural entrance points," but the obvious connotation is the points between which one may most reasonably be said to pass from the open water of the sea into the enclosed inland waters. *Cf* Strohl, *The International Law of Bays* (1963) 68 ("the points at which the coastline can most reasonably be said to turn inward to form an indentation or bay"). Speaking of entrances with a definite headland on one side and only a gently curving shore on the other, Strohl says (*op. cit.*, 63), "The most logical method for drawing a closing line in such a situation would be to locate its origin on the side having the well marked entrance point and to locate its terminus at the closest point of land on the opposite side * * *." That is exactly the situation at the northern entrance to Chandeleur Sound, where the sharp headland of the northern tip of the Chandeleur Islands is opposite the gently curving south shore of Ship Island. Since Ship Island is now a single island with no marked turning point anywhere along its south shore, there is no geographical basis for drawing a closing line otherwise than as proposed by the United States.

Louisiana also claims the northern disputed area upon the ground that, as part of Chandeleur Sound, it has historically been treated as inland waters by the United States. But Louisiana cites only its enclosure within lines delimiting waters subject to the inland rules of navigation, and those lines are irrelevant for the reasons already discussed. See pp. 18–46, *supra*. Also the Coast Guard Line of 1953, adopted by Louisiana Act 33 of 1954, runs from the Chandeleur

Lighthouse to the Ship Island Lighthouse, somewhat east of Louisiana's present proposal at the south, but far west at the north. See Figure 10, opposite. Thus, the Coast Guard Line, even if otherwise relevant, provides no historic support for a claim to the area that Louisiana now seeks to enclose.

III

THE DECREE SHOULD INCLUDE, WITH MINOR MODIFICATIONS, THE INCIDENTAL PROVISIONS SUBMITTED BY THE UNITED STATES

A. LOUISIANA SHOULD BE REQUIRED TO ACCOUNT FOR ALL ITS PROFITS FROM THE LANDS AWARDED TO THE UNITED STATES

The final decree of December 12, 1960 provided that upon the location of the coast line of any of the defendant States, the United States and the State should each account and, upon approval of the accounts, pay over to the other "any and all sums of money" derived from the other's lands, provided that in the case of Louisiana the accounting of impounded funds should be made in accordance with the Interim Agreement dated October 12, 1956. 364 U.S. 502, 503.

The supplemental decree entered on December 13, 1965 provided for such an accounting and distribution of the proceeds of certain areas awarded by that decree to Louisiana and the United States. 382 U.S. 288, 293–294.

In the accounting a question arose concerning the receipt of pipe line rentals where the licensees, in order to protect themselves, made duplicate payments to both the United States and Louisiana. Louisiana reported the receipt of the pipeline rentals but denied

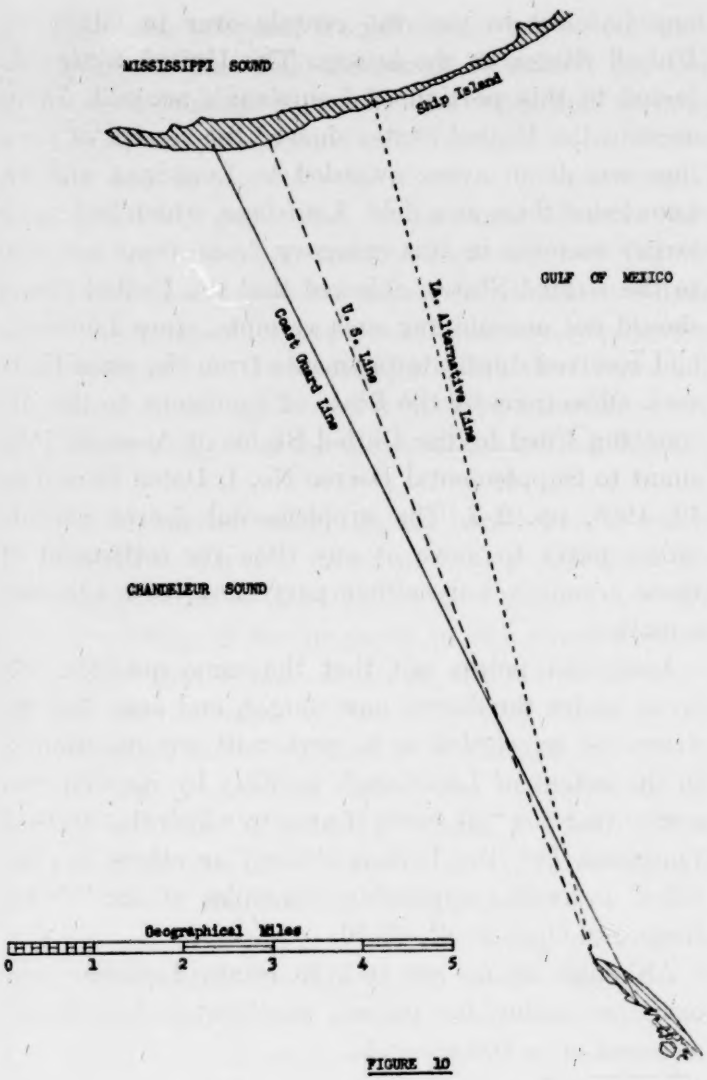

FIGURE 10

316-370—68——10

any liability to pay the rentals over to either the United States or the lessees. The United States objected to this portion of Louisiana's account. In its account the United States showed the receipt of pipeline rentals in areas awarded to Louisiana and acknowleded them as a debt. Louisiana, which had much larger receipts in this category from areas awarded to the United States, objected that the United States should not account for such receipts, since Louisiana had received duplicate payments from the same licensees. Objections by the State of Louisiana to the Accounting Filed by the United States of America Pursuant to Supplemental Decree No. 1, Dated December 13, 1965, pp. 2–3. The supplemental decree permits either party to move at any time for settlement of those accounts, but neither party has yet made such a motion.

Louisiana points out that the same question will recur under the decree now sought, and asks that the decree be so worded as to pretermit any question as to the extent of Louisiana's liability by requiring an accounting for "all sums, if any, to which the State of Louisiana [or, the United States] or others are entitled under the applicable principles of law."[61] La. Resp. and Opp. 60–61, 69–70.

Although we do not seek to retain duplicate payments as against the payors, we object to Louisiana's proposal upon two grounds.

[61] In paragraph 5 of the proposed decree Louisiana also would transpose the subparagraphs, putting the requirements that the plaintiff account before the requirements that the defendant account.

First, the proposal would reopen matters already adjudicated. The final decree of December 12, 1960 requires Louisiana to account for "any and all sums of money" derived from lands awarded to the United States and to pay "a sum equal to such amounts." 364 U.S. 502, 503. Also, in the case of sums held impounded under the Interim Agreement of October 12, 1956, the suggestion seems calculated to detract from the terms of the agreement and the requirement of the decree of December 12, 1960, that sums held pursuant to the agreement be paid in accordance with its terms, subject to the terms of the decree, 364 U.S. 503.

Second, neither party should be allowed to retain, against both the true owner and the payor, sums that it has received as a result of its wrongful assertion of ownership of the property of the other. The general rule that a true owner is entitled to all mesne profits derived after accrual of his title (or other date appropriate in the particular circumstances) was reviewed in painstaking detail and sustained by the Court in *Green* v. *Biddle,* 8 Wheat. 1, 75–83, and reaffirmed in *Russell* v. *Southard,* 12 How. 139, 156, and *Tyler* v. *Magwire,* 17 Wall. 253, 292.

The proper solution is for the losing party to return the rentals directly to the lessees wherever the prevailing party has already received a duplicate payment. A procedure is set forth in paragraph 8 of the supplemental decree of December 13, 1965, 382 U.S. at 294, which provides that "each party shall forthwith pay to any third person any amount

shown by such accounts to be payable by it to such person." The same provision is appropriate here.

B. THE DECREE SHOULD DETERMINE THE RIGHTS OF BOTH PARTIES ONLY IN THE AREAS ACTUALLY DISPUTED IN THIS CASE

Our proposed decree would declare Louisiana's right to the submerged lands "underlying the Gulf of Mexico, extending seaward from the coast line as hereinafter defined for a distance of three geographical miles * * *." U.S. Mot. 4. Louisiana complains that since this phraseology does not refer to the beds of inland waters, the subsequent provisions requiring the United States to account for its receipts from the area awarded to Louisiana will not required it to account for receipts from areas adjudged to be inland waters. Louisiana proposes to have the decree adjudicate her right to submerged lands "underlying *inland waters and* the Gulf of Mexico * * *." La. Resp. and Opp. 59, 67.

Louisiana's criticism is partly justified but the proposed remedy goes much too far in the other direction. Louisiana is entitled to have the decree identify the rights of both parties in the physical areas that have actually been in dispute in this case, but not in areas outside the issues.

Although the amended complaint in the present case put in issue only the title to the submerged lands and resources more than three geographical miles seaward from the coast line, the real issue now is the location of the coast line that determines the location of the three mile belt, so that the controversy has included,

in fact, some inland waters.[62] Louisiana is entitled to have her title to those areas established, and the United States should account accordingly.

Louisiana is not entitled, however, to a blanket decree covering all "inland waters." That would include areas and claims which have not been litigated, including inland lakes and rivers, rights in which are or may be subject to a variety of controversies between the parties that have nothing at all to do with the issues considered by the Court.

The controversy before the Court has not touched any of the physical area landward of the baseline of Zone 1, as established by the Interim Agreement of October 12, 1956. We have no objection to a decree reaching back to that line. Accordingly, the rights of both parties may be fully protected by describing the area adjudicated to belong to Louisiana as—

> underlying the Gulf of Mexico, extending from the coast line as hereinafter defined (a) seaward for a distance of three geographical miles, and (b) landward to the base line of Zone 1 as defined by the parties' Interim Agreement of October 12, 1956, as amended, wherever such base line is landward of the coast line as hereinafter defined, and bounded on the east and west by the eastern and western boundaries of the State of Louisiana.

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[62] A similar situation existed in *United States* v. *California*, 381 U.S. 139, and was one of the reasons why the Special Master's Report identifying the federal submerged lands extending three miles seaward from the coast was not rendered moot in fact, as it appeared to be in terms, by the fact that the Submerged Lands Act granted to the State an area so defined.

C. NO INJUCTION SHOULD ISSUE AGAINST THE UNITED STATES

The final decree of December 12, 1960, and the supplemental decree of December 13, 1965, enjoined Louisiana and persons claiming under her from interfering with the rights of the United States in the area awarded to the United States. Neither decree included an injunction against the United States. 364 U.S. 502; 382 U.S. 290.

We believe that the same form of decree continues to be appropriate. Louisiana now says that an injunction should run against the United States. La. Resp. and Opp. 60, 67–68, paragraph 1.

The short answer is that "unless expressly permitted by act of Congress, no injunction can be granted against the United States." *Belknap* v. *Schild*, 161 U.S. 10, 17. There is no congressional consent applicable to the present case.[63]

Moreover, Louisiana has shown no need for an injunction against the United States.

D. A PERIOD OF READJUSTMENT SHOULD BE PROVIDED FOR THE HOLDERS OF SPLIT LEASES

The boundary line drawn by the decree will undoubtedly cross lands covered by single leases, leaving

[63] The order of June 11, 1956, 351 U.S. 978, enjoined both parties from further leasing or drilling in the disputed area, except by agreement filed with the Court. That order was issued without any written or oral argument on the question of the enjoinability of the United States. The object of the order, to secure an interim agreement regarding leasing in the disputed area, was one that we desired, and we did not choose to complicate the situation at that time by raising the question of whether the United States was an enjoinable party. However, we believed then, as we do now, that the United States is not subject to injunction in this suit.

part of the leasehold on each side of the line and the fees belonging to different owners. Leases commonly provide that after an initial period called the primary term, the lease is to be maintained in force by continuous drilling or production. After a lease is split, the question arises, what is the effect upon the foregoing obligation.

The position of the United States—not in issue here—is that the split creates two leases, each of which must be so maintained by continuous drilling. This may require the lessee to institute new operations, when all of his existing operations are in the portion awarded to one party. The supplemental decree of December 13, 1965, presented this problem in a particularly acute form, as it adjudicated title on one side of a dividing line while leaving title on the other side in dispute and subject to administration under the Interim Agreement of October 12, 1956. In an area where development costs commonly run into millions of dollars, we considered it grossly unfair to require lessees to institute duplicate developments, on both sides of a line that might ultimately disappear if the remainder of the lease were later awarded to the same party. Even worse, the new development might be awarded to the same party in a way that left another part of the lease where a third development would have to be undertaken to maintain it as a lease from the other party.

Accordingly, paragraph 9 of the 1965 decree provided that until further order of the Court or agreement of the parties, leases split by that decree should continue to be regarded as single leases, though each

part would be administered and payments therefrom collected by the party to whom it was awarded or by whom it was being administered under the Interim Agreement. 382 U.S. 288, 294. Since the splits created by the supplemental decree now sought will be permanent, there is not the same reason for deferring the lessees' obligation to make the necessary adjustment and paragraph 8 of our proposed decree would vacate paragraph 9 of the 1965 decree. U.S. Mot. 7, 80–81. This would not have the effect of an affirmative determination of the obligations of the holders of split leases, since they are not parties, but neither would it protect them.

Louisiana suggests that a provision like paragraph 9 of the former decree should be in effect for two years after entry of the present decree, so that after the split leases are identified their holders may have a reasonable time to ascertain and meet their new obligations. La. Resp. and Opp. 62–63; 71, paragraph 8(a). We approve the suggestion. It should be added to paragraph 8 of our proposed decree.

E. THE VALIDITY OF LEASES ISSUED PURSUANT TO THE INTERIM AGREEMENT OF OCTOBER 12, 1956, SHOULD BE RECOGNIZED

Paragraph 2 of the Interim Agreement of October 12, 1956, divides the offshore area into four zones, beginning at the line, called the "Chapman Line," originally asserted by the United States as the coast line of Louisiana. Zone 1 is the first three miles seaward from the Chapman Line; Zone 2 is the next six miles seaward; Zone 3 extends thence seaward to the State boundary as declared by Louisiana Act 33 of

1954 (*i.e.*, three leagues seaward of the Coast Guard Line); and Zone 4 is everything seaward thereof. The zones are depicted on Exhibit "A" to the agreement. (An amended Exhibit "A" was filed with the Court on June 11, 1957.)

Paragraph 6 of the Interim Agreement provides that, notwithstanding adverse claims by the other party, Louisiana shall have exclusive administration of Zone 1 and the United States of Zone 4. Other paragraphs provide for the leasing of Zones 2 and 3, which are described as the "disputed area." The proceeds of the disputed area are to be impounded pending determination of title, but no impoundment is required for Zones 1 or 4.

Paragraph 11(a) provides, in part:

> (a) Upon the final settlement or adjudication of the aforesaid controversy, as to any area affected by a lease or portion thereof to which this agreement is applicable, the successful party, upon receipt of the impounded funds, shall validate and give recognition to such lease or portion thereof * * *.

This provision indisputably protects leases in Zones 2 and 3. Louisiana expresses doubt whether it requires the recognition of leases in Zones 1 and 4, and proposes, as paragraph 8(b) of its proposed decree, a provision for recognition by the prevailing party of leases issued by the other outside the "disputed area" as defined by the Interim Agreement. La. Resp. and Opp. 63–64; 71–72.

We think that Louisiana's doubt is groundless because the matter is squarely covered by the Interim

Agreement. Leases issued in Zones 1 and 4 under the authority of paragraph 6 have been authorized by both parties to the same extent as leases issued in the "disputed area" of Zones 2 and 3, and are equally entitled to recognition under paragraph 11(a), *supra*. The prerequisite of "receipt of the impounded funds" can only be understood as meaning "impounded funds, if any." Even in the "disputed area" there may be no impounded funds. For example, impoundment is not required where payments are made to both parties. Nevertheless, if there is any uncertainty as to the obligation to recognize leases issued by the other party in Zone 1 or Zone 4 under paragraph 6 of the Interim Agreement, an express provision for such recognition should be included in the decree.

We cannot accede to Louisiana's proposed form of decree, however, because it is not limited, at least on its face, to the area covered by the Interim Agreement. We object to any provision that might require the United States to recognize leases issued by Louisiana on federal property, outside the authority of the Interim Agreement, beyond what is provided by section 6 of the Outer Continental Shelf Lands Act, 67 Stat. 465, 43 U.S.C. 1335. Because Louisiana's doubt seems fanciful and it is not known whether any lands to be awarded to the United States are actually affected by leases of this sort, further exploration of the problem of draftsmanship seems premature.

Louisiana would also include in the decree a provision requiring the parties to establish procedures for such recognition of leases, where none is specified by the Interim Agreement. La. Resp. and Opp. 64:72,

paragraph 8(c). This too is an administrative detail that should be left to the parties. It is not an appropriate subject to include in the decree at this time.

F. THE DECREE SHOULD INCLUDE DEFINITIONS OF RELEVANT TERMS

Paragraphs 9–13 of our proposed decree include definitions of terms and statements of principles relevant to the delimitation of the coast line. U.S. Mot. 7–9. Louisiana would omit such provisions, on the ground that since the entire coast line is to be identified by specific points, there is no need for the guidance of definitions and principles, as there was in *United States* v. *California,* 382 U.S. 448, where none of the coast line was actually identified in the decree by precise points. La. Resp. and Opp. 61.

The points that will be identified by this decree may not remain forever the appropriate points to mark the ambulatory coast line of Louisiana. When it becomes necessary to redefine any part of the coast line, it will be most useful to have the guidance of a formal adjudication of the exact principles by which the line was derived. Such a statement also will make the decree a far more useful precedent in other States. The Court cannot draw the coast line without deciding what principles it will apply. We see no reason why they should not be disclosed by the decree as well as the opinion of the Court.

In any event, there is a clear need for a statement of the principles and definitions showing how the boundary line, which the proposed decrees do not identify by specific points, is to be derived from the described coast line. These include the definition of

"geographical mile" by its former value of 1,853.248 meters rather than its present value of 1,852 meters, because of the practice already established by the parties in this area, and the use of measurements at grid scale of the Louisiana Plane Coordinate System, South Zone, rather than at true geographic scale. U.S. Mot, 8, 56–59. Louisiana has indicated its agreement with these proposals, but omits them from its proposed decree. La. Resp. and Opp. 28. Without them, doubt would remain as to just how the decree directs the boundary line to be measured from the coast line.

CONCLUSION

For the foregoing reasons, the Court should enter the supplemental decree proposed by the United States, with the modifications indicated herein, and should reject the proposed decrees submitted by the State of Louisiana.

Respectfully submitted.

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AUGUST 1968

APPENDIX A

1. Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. (Pt. 2) 1606:

Article 3

Except where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.

* * * * *

Article 5

1. Waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.

* * * * *

Article 6

The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.

Article 7

* * * * *

2. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is

a line drawn across the mouth of that indentation.

3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water areas of the indentation.

4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

* * * * *

Article 8

For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast.

* * * * *

Article 10

1. An island is a naturally-formed area of land, surrounded by water, which is above water at high-tide.

2. The territorial sea of an island is measured in accordance with the provisions of these articles.

Article 11

1. A low-tide elevation is a naturally-formed area of land which is surrounded by and above water at low-tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.

2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own.

* * * * *

Article 13

If a river flows directly into the sea, the baseline shall be a straight line across the mouth of the river between points on the low-tide line of its banks.

2. Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1301–1315:

Sec. 2 [43 U.S.C. 1301]. When used in this Act—

(a) The term "lands beneath navigable waters" means—

(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and water thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and

(3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;

(b) The term "boundaries" includes the seaward boundaries of a State or its boundaries" in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 4 hereof but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico;

(c) The term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters;

* * * * *

Sec. 3 [43 U.S.C. 1311]. Rights of the States.—

(a) It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such

lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

(b) (1) The United States hereby releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources; (2) the United States hereby releases and relinquishes all claims of the United States, if any it has, for money or damages arising out of any operations of said States or persons pursuant to State authority upon or within said lands and navigable waters; and (3) the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States shall pay to the respective States or their grantees issuing leases covering such lands or natural resources all moneys paid thereunder to the Secretary of the Interior or to the Secretary of the Navy or to the Treasurer of the United States and subject to the control of any of them or to the control of the United States on the effective date of this Act, except that portion of such moneys which (1) is required to be returned to a lessee; or (2) is deductible as provided by stipulation or agreement between the United States and any of said States;

* * * * *

SEC. 4. [43 U.S.C. 1312]. SEAWARD BOUNDARIES.—The seaward boundary of each original

coastal State is hereby approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is hereby approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress.

3. Act of February 19, 1895, Section 2, 28 Stat. 672, as originally enacted:

AN ACT To adopt special rules for the navigation of harbors, rivers and inland waters of the United States, except the Great Lakes and their connecting and tributary waters as far east as Montreal, supplementary to the Act of August nineteenth, eighteen hundred and ninety, entitled "An Act to adopt regulations for preventing collisions at sea."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That on and

after March first, eighteen hundred and ninety-five, the provisions of sections forty-two hundred and thirty-three, forty-four hundred and twelve, and forty-four hundred and thirteen of the Revised Statutes and regulations pursuant thereto shall be followed on the harbors, rivers and inland waters of the United States.

The provisions of said sections of the Revised Statutes and regulations pursuant thereto are hereby declared special rules duly made by local authority relative to the navigation of harbors, rivers and inland waters as provided for in Article thirty, of the Act of August nineteenth, eighteen hundred and ninety, entitled "An Act to adopt regulations for preventing collisions at sea."

SEC. 2. The Secretary of the Treasury [64] is hereby authorized, empowered and directed from time to time to designate and define by suitable bearings or ranges with light houses, light vessels, buoys or coast objects, the lines dividing the high seas from rivers, harbors and inland waters.

SEC. 3. Collectors or other chief officers of the customs shall require all sail vessels to be furnished with proper signal lights. Every such vessel that shall be navigated without complying with the Statutes of the United States, or the regulations that may be lawfully made thereunder, shall be liable to a penalty of two hundred dollars, one-half to go to the informer;

[64] "Commandant of the Coast Guard" is now substituted for "Secretary of the Treasury." Department of Transportation Act, Oct. 15, 1966, sec. 6(b)(1), 80 Stat. 938; Department of Transportation regulation of Mar. 31, 1967, 32 Fed. Reg. 5606, 49 C.F.R. § 1.4(a)(2); 33 U.S.C. 151.

for which sum the vessel so navigated shall be liable, and may be seized and proceeded against by way of libel in any district court of the United States having jurisdiction of the offense.

SEC. 4. The words "inland waters" used in this Act shall not be held to include the Great Lakes and their connecting and tributary waters as far east as Montreal; and this Act shall not in any respect modify or affect the provisions of the Act entitled "An Act to regulate navigation on the Great Lakes and their connecting and tributary waters," approved February eighth, eighteen hundred and ninety-five.

4. Excerpts from Coast Guard Regulations, 33 C.F.R., Part 82:

§ 82.1 *General basis and purpose of boundary lines.*

Under section 2 of the act of February 19, 1895, as amended (28 Stat. 672, 33 U.S.C. 151), the regulations in this part are prescribed to establish the lines dividing the high seas from rivers, harbors, and inland waters in accordance with the intent of the statute and to obtain its correct and uniform administration. The waters inshore of the lines described in this part are "inland waters," and upon them the inland rules and pilot rules made in pursuance thereof apply. The waters outside of the lines described in this part are the high seas and upon them the international rules apply. The regulations in this part do not apply to the Great Lakes or their connecting and tributary waters.

§ 82.2 *General rules for inland waters.*

At all buoyed entrances from seaward to bays, sounds, rivers, or other estuaries for which specific lines are not described in this part, the waters inshore of a line approximately parallel with the general trend of the shore, drawn through the outermost buoy or other aid to navigation of any system of aids, are inland rules and pilot rules made in pursuance thereof apply, except that Pilot Rules for Western Rivers apply to the Red River of the North, the Mississippi River and its tributaries above Huey P. Long Bridge, and that part of the Atchafalaya River above its junction with the Plaquemine-Morgan City alternate waterway.

§ 82.95 *Mobile Bay, Ala., to Mississippi Passes, La.*

Starting from a point which is located 1 mile, 90° true, from Mobile Point Light, a line drawn to Mobile Entrance Lighted Whistle Buoy 1; thence to Ship Island Light; thence to Chandeleur Light; thence in a curved line following the general trend of the seaward, highwater shorelines of the Chandeleur Islands to the southwestern-most extremity of Errol Shoal (29° 25.8′ N. latitude, 89° 00.8′ W. longitude); thence to a point 5.1 miles 107° true, from Pass a Loutre Daybeacon.[65]

§ 82.103 *Mississippi Passes, La., to Sabine Pass, Tex.*

A line drawn from a point 5.1 miles, 107° true, from Pass a Loutre Daybeacon to South

[65] Originally, "thence to Pass a Loutre Lighted Whistle Buoy 4." 18 Fed. Reg. 7893.

Pass Lighted Whistle Buoy 2;[66] thence to Southwest Pass Entrance Midchannel Lighted Whistle Buoy; thence to Ship Shoal Daybeacon;[67] thence to Calcasieu Channel Lighted Whistle Buoy 1; thence to Sabine Pass Lighted Whistle Buoy 1.

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[66] Originally, "A line drawn from Pass a Loutre Lighted Whistle Buoy 4 to South Pass Lighted Whistle Buoy 2." 18 Fed. Reg. 7894.

[67] Originally, "Ship Shoal Lighthouse." 18 Fed. Reg. 7894.

APPENDIX B

Development of Article 11 of the Convention on the Territorial Sea and the Contiguous Zone by the International Law Commission.

1. Rapporteur's first draft, April 4, 1952. *Report on the Regime of the Territorial Sea* (A/CN.4/53), pp. 21-22:

Article 5

Base Line

* * * * *

4. Elevations of the sea bed situated within the territorial sea, though only above water at low tide, are taken into consideration for the determination of the base line of the territorial sea.

2. Discussion, 170th Meeting of the Commission, July 23, 1952. 1 *Yearbook of the International Law Commission* (1952) 175-177:

9. [Mr. François:] Mr. HUDSON had criticized paragraph 4 on the grounds that it was incomprehensible. Sub-Committee No. II, however, could not be held responsible since such a provision occurred in the North Sea Fisheries Convention of 1882 and, as far as he knew, no doubts had hitherto been raised as to its meaning which was that, even if an elevation of the sea bed was only uncovered at low tide, provided it was situated within the territorial sea, the limits of the territorial sea would thereby be extended further out into the high seas That point of view corresponded with the ob-

servation by the Preparatory Committee of The Hague Conference on the replies of governments on point VI (definition of an island) in the questionnaire. That observation read as follows:

"A compromise may be contemplated. It will consist in allowing an island (i.e., an isolated island) to have its own territorial waters only if it is above water at high tide, but in taking islands which are above low-water mark into account when determining the base-line for the territorial waters of another island or the mainland, if such islands be within those waters."

* * * * *

33. Despite Mr. Francois' explanations, [Mr. Zourek] still found paragraph 4 obscure. Was a drying rock to be considered as an island? In the next draft to be prepared by the special rapporteur some strictly technical information would have to be included to make the provisions comprehensible.

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35. Referring to paragraph 4, [Mr. Hudson] said he was unable to find any provision of that kind in the North Sea Fisheries Convention of 1882.

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37. Mr. Francois said that, if the Commission accepted the principle in paragraph 4, its drafting could always be improved. As he had framed it, the provision related only to drying rocks, as he had followed Sub-Committee No. II in distinguishing between drying rocks and islands. The Harvard Research draft, on the other hand, applied the same rule to both.

(Article 5 was approved in substance but not in form, *id.* 178.)

3. Rapporteur's second draft, February 19, 1953. ***Second Report on the Regime of the Territorial Sea*** **(A/CN.4/61), p. 30:**

Article 5

Base Line

* * * * *

4. Elevations of the sea-bed which are only above water at low tide and are situated partly or entirely within the territorial sea shall be treated as islands for the purpose of determining the outer limit of the territorial sea.

4. Rapporteur's amended second draft, May 18, 1953. ***Addendum to the Second Report on the Regime of the Territorial Sea*** **(A/CN.4/61/Add. 1), pp. 5–6:**

Article 5

* * * * *

3. Drying rocks and shoals that are exposed between the datum of the chart and high water if within the territorial sea, may be taken as individual points of departure for measuring the territorial sea, thereby causing a bulge in the outer limit of the latter.

5. Rapporteur's third draft, February 4, 1954. ***Third Report on the Regime of the Territorial Sea*** **(A/CN.4/77), p. 13:**

Article 13

Drying Rocks

Drying rocks and shoals that are exposed between the datum of the chart and high water and are situated wholly or partly within the territorial sea may be taken as individual points of departure for measuring the territorial sea.

6. Discussion, 260th and 261st Meetings of the Commission, July 2 and 5, 1954. 1 *Yearbook of the International Law Commission* (1954) 94–98:

Article 13: Drying rocks (A/CN.4/77) [7]

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57. Mr. FRANÇOIS, Special Rapporteur, said that his draft article 13 laid down that drying rocks and shoals which were situated wholly or partly within the territorial sea could be taken as individual points of departure for measuring the territorial sea. For that purpose, drying rocks thus situated were treated exactly like islands. But drying rocks situated in the high seas were not treated like islands and had no territorial sea of their own. Unless that distinction were made, a country like Holland might extend its territorial sea very considerably by advancing from one shoal to another, claiming that a shoal situated within the territorial sea of another shoal had itself a territorial sea. The gist of draft article 13 was that a drying rock within T miles of coast (where T=breadth of the territorial sea) could serve to extend the territorial waters by causing a bulge in the outer limit of the latter. A drying rock situated more than T miles from the shore, however, should be ignored for the purposes of defining the outer limit of the territorial sea.

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72. Mr. FRANÇOIS, Special Rapporteur, said that drying rocks and shoals in the high seas which only emerged at low water were not to be used as points of departure for measuring the

[7] Article 13 read as follows:

"Drying rocks and shoals that are exposed between the datum of the chart and high water and are situated wholly or partly within the territorial sea may be taken as individual points of departure for measuring the territorial sea."

territorial sea. It was only drying rocks and shoals within T miles from a coast that were virtually treated like islands under the provisions of article 13.

* * * * *

77. Mr. PAL quoted from the International Court's decision in the Fisheries case. The Court had referred to the contentions of the United Kingdom Government which had claimed that, in order to be taken into account, a drying rock should be situated within four miles of permanently dry land. The Court had not had to consider that in fact none of the drying rocks used by Norway as base points was more than four miles from the coast. [Footnote omitted.] For the Commission, however, the question of a maximum permissible distance of the drying rocks from the coast would be a relevant and pertinent one. If drying rocks, irrespective of their distance from the coast, were going to be given a territorial sea of their own, that would be tantamount to raising them to the status of islands; he could see no justification for such a course.

* * * * *

3. Mr. LAUTERPACHT proposed that the words "situated wholly or partly within the territorial sea" should be replaced by "if within the territorial sea as measured from the mainland or from an island".

4. The purpose of his amendment was to prevent a State from using a succession of drying rocks off its coast for the purpose of extending its territorial sea. Under his proposed amendment, only drying rocks near the coast, namely, within the territorial waters as measured from the coast, could be used for an extension of the territorial sea. The device of using drying rocks for the purpose of extending territorial waters could, under the proposed amendment, be used only once. A limit had to be set to the somewhat

artificial encroachments upon the area of the high seas.

5. Mr. FRANÇOIS, Special Rapporteur, did not oppose the amendment.

* * * * *

Mr. Lauterpacht's amendment was not adopted, 4 votes being cast in favour, 4 against, with 4 abstentions.

21. Mr. CORDOVA thought that by rejecting Mr. Lauterpacht's amendment the Commission had shown that it interpreted the Special Rapporteur's draft in a sense contrary to that of Mr. Lauterpacht's text. The Drafting Committee should be asked to redraft article 13 in such a way as to avoid any misunderstanding.

22. Mr. FRANÇOIS, Special Rapporteur, thought that it would be sufficient to add some explanatory remarks in the comment to the article.

23. Mr. LAUTERPACHT pointed out in reply to Mr. Cordova that, as his own draft had only been rejected because it had been put to the vote first, he was satisfied with the Special Rapporteur's assurance that he interpreted the article in the sense of the amendment.

Subject to redrafting by the Drafting Committee, article 13 was adopted by 9 votes to none, with 4 abstentions.

7. Commission draft, August 5, 1954. *Report of the International Law Commission Covering the Work of Its Sixth Session* (A/CN.4/88), 2 *Yearbook of the International Law Commission* (1954) 156:

Article 12

Drying rocks and shoals

Drying rocks and shoals which are wholly or partly within the territorial sea may be

taken as points of departure for delimiting the territorial sea.

Comment

Drying rocks and shoals situated wholly or partly in the territorial sea are treated in the same way as islands. The limit of the territorial sea will accordingly make allowances for the presence of such drying rocks and will jut out to sea off the coast. Drying rocks and shoals, however, which are situated outside the territorial sea have no territorial sea of their own

The Commission considers that the above article expresses the international law in force.

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8. Comment from the United Kingdom, February 1, 1955. 2 *Yearbook of the International Law Commission* (1955) 58:

Article 12. Drying rocks and shoals

Her Majesty's Government approve this artical subject to the insertion, after the words "territorial sea" in line 2, of "as measured from the low-water mark or from a base line" and the insertion, for the word "de-limiting", of the words "further extending". This amendment is intended to ensure that drying shoals are used only once to extend territorial waters and not in series with each extension bringing further rocks into range as points of departure for further extension.

In the interests of clarity, Her Majesty's Government suggest that this article should refer to "Drying rocks and drying shoals", as there is some confusion as to the precise meaning of the word "shoal."

9. Rapporteur's draft, May 16, 1955 (A/CN.4/93) and discussion, 324th Meeting of the Commission, July 1, 1955. 1 *Yearbook of the International Law Commission* (1955) 252:

Article 12[11]: Drying rocks and [drying] shoals

"Drying rocks and drying shoals which are wholly or partly within the territorial sea, as measured from the mainland or an island, may be taken as points of departure for further extending the territorial sea."

* * * * *

78. Sir Gerald FITZMAURICE said that the basis principle was that drying rocks and drying shoals were not points of departure for measuring the territorial sea. However, if a drying rock or a drying shoal were to be found within the territorial sea (such territorial sea being measured as if the drying rock or shoal were not there at all), then the drying rock or shoal in question could be used in order to extend the territorial sea and project seaward its outer limit.

79. The process of extension by the use of drying rocks and shoals could be done only once; it was not permissible to jump from one drying rock to another and extend the territorial sea unduly in that manner.

80. Mr. SCELLE said that, on the understanding that the article was to be construed in the manner indicated by Sir Gerald, he would not press his point.

Article 12 was adopted unanimously.

10. Commission draft, 1955. ***Report of the International Law Commission Covering the Work of Its Seventh Session*** **(A/2934), 2** ***Yearbook of the International Law Commission*** **(1955) 38:**

Article 11

Drying rocks and drying shoals

Drying rocks and drying shoals which are wholly or partly within the territorial sea, as measured from the mainland or an island, may be taken as points of departure for further extending the territorial sea.

Comment

The modifications made in the 1954 text of this article (article 12 of the 1954 draft) do not affect the substance of the article. The phrase "which are wholly or partly within the territorial sea" refers both to drying rocks and to drying shoals.

11. Discussion, 379th Meeting of the Commission, July 2, 1956. 1 ***Yearbook of the International Law Commission*** **(1956) 283:**

Article 11: Drying rocks and drying shoals

59. With reference to a point raised by Mr. AMADO and Mr. FRANÇOIS, Rapporteur, concerning the words "for further extending the territorial sea" in the article itself, Sir Gerald FITZMAURICE felt that the present text should be retained since it did indicate as clearly as perhaps could be indicated within the compass of a single sentence that drying rocks and drying shoals could only be used once as points of

departure for extending the territorial sea and that the process could not be repeated by leap-frogging, as it were, from one rock or shoal to another. The most that could be done was to delete the word "further if so desired.

It was agreed that that word should be deleted.

12. Final Commission draft, 1956. ***Report of the International Law Commission Covering the Work of Its Eighth Session*** **(A/3159),** **2** ***Yearbook of the International Law Commission*** **(1956) 270–271:**

Drying rocks and drying shoals

Article 11

Drying rocks and drying shoals which are wholly or partly within the territorial sea, as measured from the mainland or an island, may be taken as points of departure for measuring the extension of the territorial sea.

Commentary

(1) Drying rocks and shoals situated wholly or partly in the territorial sea are treated in the same way as islands. The limit of the territorial sea will make allowance for the presence of such drying rocks and will show bulges accordingly. On the other hand, drying rocks and shoals situated outside the territorial sea, as measured from the mainland or an island, have no territorial sea of their own.

(2) It was suggested that the terms of article 5 (under which straight baselines are not drawn to or from drying rocks and shoals) might be incompatible with the present article. The Commission sees no incompatibility. The fact that for the purpose of determining the breadth of the territorial sea drying rocks and shoals are

assimilated to islands does not imply that such rocks and shoals are treated as islands in every respect. In the comment to article 5 it has already been pointed out that if they were so treated, then, where straight baselines are drawn, and particularly in the case of shallow waters off the coast, the distance between the baseline and the coast might be far greater than that required to fulfill the purpose for which the straight baseline method was designed.

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